DOCUMENT RESUME

ED 251 894 EA 016 606

AUTHOR Clear, Delbert K.
TITLE Bargaining.
PUB DATE 83
NOTE 76p.; Chapter 3 of: The Yearbook of School Law, 1983 (EA 016 603).
PUB TYPE Books (010) -- Information Analyses (070) -- Legal/Legislative/Regulatory Materials (090)

EDRS PRICE MF01 Plus Postage. PC Not Available from EDRS.
DESCRIPTORS *Arbitration; *Collective Bargaining; Constitutional Law; *Court Litigation; Educational Administration; Elementary Secondary Education; *Grievance Procedures; *Labor Relations; Negotiation Impasses; *School Law; School Personnel; Scope of Bargaining; Unions

ABSTRACT

Reviewed in this chapter are decisions handed down in 1982 involving aspects of collective bargaining. Much of this litigation is perceived as rooted in attempts by school boards to upset awards of arbitrators or by efforts of employees' associations to consolidate dearly-won power; these actions result from many boards' and associations' resentment of the power sharing inherent in binding arbitration and bargaining. Cases involving constitutional issues, authority to bargain, recognition of unions and representation problems, and rights and obligations of exclusive bargaining representatives are analyzed. A discussion of scope of bargaining includes cases addressing duty to bargain; interrelationship with other laws; proposals within mandatory, permissive, and prohibited scope of bargaining; and terms of collective bargaining agreements. Grievance issues are considered at length, including the topics of grievability and arbitrability, presumption of arbitrability, who determines disputes, remedy as a factor in arbitrability, procedural issues, management prerogatives as a bar, tenure issues, and contract interpretation. Judicial review of awards, standard of review, and propriety of awards are also discussed. Analysis of litigation involving impasse and dispute resolution, concerted activity including strikes and enforcement actions, and miscellaneous cases conclude the chapter. (MJL)

****
* Reproductions supplied by EDRS are the best that can be made *
* from the original document. *
****

ED251894

U.S. DEPARTMENT OF EDUCATION
NATIONAL INSTITUTE OF EDUCATION
EDUCATIONAL RESOURCES INFORMATION CENTER (ERIC)

X This document has been reproduced as received from the person or organization originating it.
☐ Minor changes have been made to improve reproduction quality.

• Points of view or opinions stated in this document do not necessarily represent official NIE position or policy.

"PERMISSION TO REPRODUCE THIS MATERIAL IN MICROFICHE ONLY HAS BEEN GRANTED BY

T. Jones

TO THE EDUCATIONAL RESOURCES INFORMATION CENTER (ERIC)."

EA 016 606

3

BARGAINING

Delbert K. Clear

Introduction 3.0
Constitutional Issues 3.1
Authority to Bargain 3.2
Recognition of Unions and Representation Problems 3.3
  Unit Determination 3.3a
    Supervisory, Managerial, and Confidential Employees 3.3a(1)
    Other Issues Regarding Recognition and Representation 3.3a(2)
  Elections 3.3b
Rights and Obligations of Exclusive Bargaining Representatives 3.4
  Union Rights 3.4a
  Union Security 3.4b
  Obligations of the Exclusive Representative 3.4c
Scope of Bargaining 3.5
  Duty to Bargain 3.5a
  Interrelationship with Other Laws 3.5b
  Proposals Within Mandatory Scope of Bargaining 3.5c
  Proposals Within Permissive Scope of Bargaining 3.5d
  Proposals Within Prohibited Scope of Bargaining 3.5e
  Terms of Collective Bargaining Agreements 3.5f
Grievances 3.6
  Grievability and Arbitrability 3.6a
    Presumption of Arbitrability 3.6a(1)
    Who Determines? 3.6a(2)
    Remedy as a Factor in Arbitrability 3.6a(3)
    Procedural Issues 3.6a(4)
    Management Prerogatives as a Bar 3.6a(5)
    Tenure Issues 3.6a(6)
    General 3.6a(7)
  Judicial Review of Awards 3.6b
    Standard of Review 3.6b(1)
    Propriety of Awards 3.6b(2)
Impasse and Dispute Resolution 3.7
  Factfinding and Arbitration 3.7a
  Rights on Expiration of Contract 3.7b

Concerted Activity 3.8
Strikes 3.8a
Enforcement Actions 3.8b
Miscellaneous Decisions 3.9

3.0 INTRODUCTION

Some boards of education apparently consider the duty to bargain as abhorrent as receiving Caesar's "most unkindest cut of all," and consider its realities to be no less fearsome than its anticipation. Such an attitude is not justified (or, failing that, realistic). Admittedly, collective bargaining agreements do not solve all employer-employee problems, and no board should expect that certification of a unit and the beginning of bargaining will do so, being but a small price to pay, perhaps, for the surrender of a limited number of managerial prerogatives. Nevertheless, there have been benefits to employers as well as to employees as a result of public sector bargaining. Certainly its growth since Wisconsin pioneered the idea in 1959 has been partially in response to the desire to avoid teacher strikes and other public airing of the differences between public employers and their employees. Without doubt, success has been achieved, if reduced frequency of teacher strikes is taken as the measure; whereas they once were widespread and bitter they are practically unheard of in recent years and their reduction closely parallels the growth of bargaining and impasse resolution legislation in the various states.

Despite occasional newspaper editors' trumpeting that the absence of strikes thus proves that bargaining legislation has restored "peace" to a vital public service, public sector bargaining does not actually reduce employer-employee disputes. In fact, it increases them, inasmuch as the avenues for redress of problems short of extreme action encourages filing for formal resolution of many issues that would otherwise be conceded to management. However, the forum for resolution has changed. Formerly the superintendent's office, the sidewalks, or the polling booth were the arenas for resolving differences, now the contests occur in hearing rooms, arbitrators' offices, and court rooms. Though they may be less visible than previous ones, they reflect differences neither less present nor less deep-seated than before.

This should occasion no surprise or dismay, because the purpose of collective bargaining and impasse resolution legislation never has been to eradicate differences of interest between employers and employees.

The real goal is to provide vehicles by which such differences may be articulated and resolved short of institutional disruption or unilateral exercise of the employer's economic and social power, against which individual resistance is futile. However laudable this goal may sound in the realm of ideas, school boards who have to implement it, not unlike their counterparts in the private sector, sometimes find it difficult to accommodate comfortably the investment of employees with these rights and procedures. Merely by invoking collective action, employees exert countervailing force against the traditional employer perception that the ultimately desirable work force is a labor pool made up of individuals who are both sufficiently skilled to perform needed tasks and available as needed. In sum, they should be much like other raw materials and commodities that are being transformed into products or services.

Permitting, or encouraging, employees to organize cannot, therefore, avoid struggles for power because any "gains" the employees make will inevitably be interpreted by employers as erosion of their prerogatives. It makes little difference whether the struggles are resolved by collective action such as boycotts, strikes, or other job actions; or through compulsory mediation, arbitration, and commission rulings. Either way, the employers perceive the advantage to be to labor because of the external pressure that is placed on them to accept the questionable "benefits" of various concessions rather than incur the "costs" of refusing them. Merely imposing less combative processes than strikes changes the power-exchange elements of mandated labor and management relations not at all. The threat of losing the decision to the pressure of a work stoppage or to a third party arbitrator puts pressure on employers to grant concessions, thus power shifts from its original locus to a new one.

Though such a typology is oversimple, much of the litigation regarding collective bargaining and labor relations in education during 1982 seems rooted in it. Again and again, the cases record the attempts of boards to upset awards of arbitrators or state public employee relations board (hereinafter referred to as PERBs or PERCs when Commission is the usage in the state), or of associations to consolidate or regain dearly-won power. The review that follows,[1] though not selectively done to validate the impression, suggests that many boards and associations still hold an immature view of collective bargaining and are deeply resentful of the power sharing that bargaining and binding arbitration

1. Although this review concentrates primarily on cases in public elementary and secondary education, occasionally when extrapolation is appropriate, cases in higher education and nonschool public sector bargaining are reviewed.

has forced upon them.[2] Sometimes boards sue to regain lost power; other times individual employees sue to remove themselves from association domination; and it is not unusual to find associations suing boards or individuals to regain or maintain power. The possibilities for dispute seem endless.

3.1 CONSTITUTIONAL ISSUES

The word seems to be out that collective bargaining and other labor relations issues are not often recognized by the courts as presenting constitutional issues. Rarely, during 1982, was litigation couched in such terms; of the 161 cases reviewed, few extensively utilized state or federal constitutional rights as bases for disposition. The United States Supreme Court, however, ruled early in 1983 that a bargaining agreement granting the recognized unit exclusive access to the district's internal mailing and communications systems does not violate a competing unit's first and fourteenth amendment guarantees of free speech and equal protection of the laws. The Seventh Circuit Court of Appeals had subjected the practice to strict scrutiny and found in the affirmative. In reversing, the Supreme Court found that standard in error. (It was a 5-4 decision, with a vigorous dissent.) Rather, it reasoned, a district's mailing system is not a "public forum" in which expressive speech is broadly protected. It is, instead, a "limited public forum" in which

> not all speech is equally situated, and the state may draw distinctions which relate to the special purpose for which the property is used. As we have explained above, for a school mail facility, the difference in status between the exclusive bargaining representative and its rival is such a distinction.[3]

The Court also noted, with approval, that

> substantial alternative channels ... remain open for union-teacher communication to take place. These means run from bulletin boards to meeting facilities to the United States Mail. During election periods, PLEA is assued of equal access to all modes of communications. There is no showing here that PLEA's ability to communicate with teachers is seriously impinged by the restricted access to the internal mail system.[4]

2. If politics makes strange bed-fellows, so also does the emotional reaction to collective bargaining. In 1982 the policy and resolutions committee of the Wisconsin Assocation of School Boards presented its delegate assembly with a resolution calling for the legislature to restore the right to strike to teachers.

3. Perry Educ. Ass'n v. Perry Local Educators' Ass'n, 103 S. Ct. 948, 960 (1983).

4. *Id.* at 959.

Educators in Florida should receive the Court's decision with much interest for their supreme court ruled in 1982 that denying a competing organization access to the district's bulletin boards and property for recruiting, "constitutes censorship in its most direct form."[5] In New York, the decision should also be eagerly awaited, for there, a court has ruled that such exclusive agreements are not unconstitutional, at least insofar as complaints against them are lodged by individual teachers.[6] In Alabama, the matter arose in a different form. There, a school district had prohibited everybody, the bargaining agent included, from distributing political, sectarian, or "special interest" materials without prior approval. Further, board policies required prior approval of all visitors to a school building who wished to "interpet, sell, and/or promote products or services."[7] The dispute came when these policies were cited in denying the teachers' association access to the schools to disseminate documents and other information opposing the board's proposal to implement a teacher competency testing program. In federal district court the association argued successfully that the policies were overbroad and that the administration had deprived its members of first and fourteenth amendment protections. The Fifth Circuit Court of Appeals, although affirming in part and reversing in part, upheld the teachers' request for "policies and guidelines that will assure, as best as is humanly possible, the uniform application of criteria that will allow teachers to communicate with each other and with their association."[8] In Michigan the principle was tested in a different context when public employees were found to have first amendment protection to hear views from their employers opposing the organization of a union as well as the views of the union supporting it. The court was unconvinced that the public employer's actions constituted infringement on the union's right to freedom of association or constituted an expenditure of funds for an unauthorized "public purpose."[9]

The United States Supreme Court disposed of three labor relations in education cases during 1982 by dismissing one and denying review for the others. The dismissed case confirmed the decision of the Ohio

5. School Bd. of Dade Cty. v. Dade Cty. Teachers' Ass'n, 421 So. 2d 645, 649 (Fla. Ct. App. 1982).

6. Werner v. Middle Country Cent. School Dist. No. 11, 454 N.Y.S.2d 116 (N.Y. App. Div. 1982).

7. Hall v. Board of School Comm'rs of Mobile Cty., 681 F.2d 965, 967 (5th Cir. 1982).

8. *Id.* at 968.

9. Local 79 Serv. Employees Int'l Union, AFL-CIO, Hosp. Employees' Div. v. Lapeer Cty. Gen. Hosp., 314 N.W.2d 648 (Mich. Ct. App. 1982).

Supreme Court to uphold a teacher organization's right to obtain fair share fees from nonmembers. The state supreme court had found that the board's decision to bargain exclusively with one unit was not unreasonable, and did not deprive nonmember teachers of their property without due process of law.[10]

One of the cases denied review left standing a Third Circuit Court of Appeals ruling that administrative proceedings in labor relations such as grievance procedures, arbitration hearings, and employment relations board review are sufficiently judicial to meet fourteenth amendment procedural due process guarantees. The circuit court had concluded that

> while a state may have specified procedures that it deemd adequate, minimum due process standards are a matter of federal law.... Although we are not bound by a state's provisions on due process, we should not lightly override a policy adopted by its legislature and approved by its supreme court. The test is not whether the federal court could design a better scheme, but whether the state's procedures cross the threshold of minimum guarantees.[11]

The other denied case supported the practice of not permitting nonmembers of associations to vote in contract ratification elections, payment of fair share service fees notwithstanding.[12]

Though the High Court has refused to review these cases, it will undoubtedly have the opportunity to examine the issues again. Not only is there lack of uniformity among the courts on the matter of exclusive use of communications channels, but also withholding of fair share service fees has been differently received (despite the Court's 1977 ruling in *Abood* clearly sanctioning the involuntary collection of service fees from nonmember participants in bargaining units[13]). For instance, a federal district court in New Jersey has found unconstitutional a statute which permitted public employers to withhold from nonmembers' salaries, service fees that failed to distinguish between representation costs, and costs of political lobbying, and other ideological activities of the organization. The court indicated, however, that it would be proper for the state to require the payment of a service fee related solely to the costs of bargaining, which focuses on the amount of the fee rather than its mere existence.[14] In the state of Washington, on the other hand,

10. Jefferson Area Teachers' Ass'n v. Lockwood, 433 N.E.2d 604 (Ohio 1982).
11. Pederson v. South Williamsport Area School Dist., 677 F.2d 312, 316, 317 (3rd Cir. 1982); *cert. denied*, 103 S. Ct. 305 (1982).
12. Schreffler v. Pennsylvania Labor Rels. Bd., 427 A.2d 305 (Pa. Commw. Ct. 1981); *cert. denied*, 103 S. Ct. 84 (1982).
13. Abood v. Detroit Bd. of Educ., 431 U.S. 209 (1977).
14. Robinson v. New Jersey, 547 F. Supp. 1297 (D.N.J. 1982).

the state law which permits common school employees to utilize payroll deductions for union activities, including political effort, was upheld though the same privilege is denied to community college teachers and other state employees. The state teachers' association cited the first and the fourteenth amendments in attempting to convince the state's supreme court to invalidate the law, arguing that not allowing the privilege to all employees, "becomes a limitation on political contributions and expenditures and therefore a regulation of speech ... [and] takes away from public employees their First Amendment right to political speech and association as a condition of employment."[15] The court rejected the equal protection argument, finding that "community college teachers and common school teachers are two very distinct classes of employees," not a suspect classification, hence strict judicial scrutiny is not required. The freedom of speech and association claim was similarly treated: "These arguments ... ignore the fact that state workers are not prohibited entirely from contributing to the political action committees. Rather only one method of facilitating contribution is prohibited .... There are many other methods of soliciting contributions."[16]

In both Ohio and Massachusetts constitutional issues were found in the manner required for dissenting teachers to challenge the validity of their service fees and obtain refunds. In both states, the associations demanded that teachers pay first, then exhaust internal organizational remedies prior to court or other appeals to external bodies. The Ohio case arose when dissident teachers wanted to revoke their dues checkoff authorizations. The court ruled that they were not required to exhaust the internal organizational procedures prior to filing suit in order to recover dues paid prior to the time the check-off revocation became effective.[17] In Massachusetts, the law permitted collective bargaining agreements to require teachers who were not association members to pay service fees "commensurate with the cost of collective bargaining and contract administration as determined by the Association."[18] The central issue was the association's demand that the fees first be paid, then refunds sought through internal union systems, against the teachers' desire to have the appropriate fee first established by an independent tribunal. The court strongly supported the teachers, finding that both depositing the money in the association's account and subjecting the appeal to internal procedures were constitutional

15. Washington Educ. Ass'n v. Smith, 638 P.2d 77, 80 (Wash. 1981).
16. *Id.* at 80.
17. Franklin v. Columbus Bd. of Educ., 439 N.E.2d 950 (Ohio Ct. App. 1981).
18. School Comm. of Greenfield v. Greenfield Educ. Ass'n, 431 N.E.2d 180, 182 (Mass. 1982).

violations. In plain terms it described the constitutional deficiency as follows:

> Mandating resort to the rebate procedure here would produce a further constitutional difficulty because of the requirement that the entire fee be paid to the association pending proof of legitimacy. This interim payment, as the teachers contend, not only deprives them of the opportunity to engage in expressive activities with those funds, but also forces them to subsidize the objectionable activities of the organization.... [T]he teachers should not be required to suffer an interim *constitutional* deprivation, while the association is deprived only of the funds to which it is entitled by statute and agreement.[19]

Disputes that seem, on their face, to be constitutional matters sometimes receive very little constitutional attention. In one such case, three teachers claimed first amendment violations arising from their transfer, allegedly in retaliation for their union activity. The court paid little attention to the constitutional issues, and based its decision on procedural grounds. Essentially it ruled that the disposition of such complaints by a public employees' relations board or commission precludes collateral filing in federal courts alleging first amendment violations.[20]

Equal protection was cited in two companion New York cases where teachers' unions attempted to obtain reversal of a public employee relations board ruling that, pursuant to state laws, dues check-off privileges could be forfeited as a penalty for engaging in unauthorized strikes. The equal protection claim was based on two assertions: (1) that teachers' unions had borne the major burden of the law's enforcement since its inception; and, (2) that the law provided two mechanisms for resolving disputes—statewide and regional PERB hearings. The court found the first to be insubstantial, and the second, it found constitutional, inasmuch as

> appellants neither constitute a suspect class nor assert a fundamental interest; hence, to withstand judicial review, challenged procedures need only be rationally related to furthering a legitimate state interest.... The mere fact that separate administrative procedures bodies mete out different penalties, without more, does not violate equal protection.[21]

19. *Id.* at 189.
20. O'Connor v. Mazzullo, 536 F. Supp. 641 (S.D.N.Y. 1982).
21. Buffalo Teachers' Fed'n v. Helsby; Shanker v. Helsby, 676 F.2d 28, 31, 3[illegible] (2nd Cir. 1982).

Property interests were cited by teachers in New York who were trying to recover fines imposed on them as a result of an unauthorized strike. They alleged that the administrative procedure of having a district superintendent make the initial determination of the existence of a strike and then appoint a hearing officer to consider appeals regarding the validity of the determination and the penalties to be assessed, makes the hearing defective. They also claimed deprivation of property without due process of law inasmuch as the statute provided for deduction of fines from their wages without hearings to determine individual culpability. Though the court commented that "a statutory provision whereby an adjudicator of rights reviews his own initial finding is, at best, inherently suspect on due process grounds," it found persuasive precedent which clearly barred recovery.[22] The teachers' failure to pursue vigorously the matter of being fined without a hearing was held partially the reason for the denial of their claim, although the court conceded that strong precedent indicated that no substantial federal question was involved. The case is unusual in that the court repeatedly revealed sympathy for the teachers but found itself bound by contrary precedent. Subsequent claims of a similar nature would find useful the approaches the court noted as being largely (and fatally) unexplored by the teachers. New York state constitutional guarantees of certain rights to state civil service employees were found not to apply to employees of a private security firm which held a contract with a school district. The fact that the positions had, prior to their recent abolition, been civil service was held insufficient to create the employer-employee relationship necessary to invoke the constitutional protections.[23]

In Alaska, teachers were turned back from what seemed clearly to be a violation of equal protection of the laws. Alone among state employees, common school teachers were denied both the right to strike and the resolution of impasse through binding arbitration. The state's public employee relations act created three groups of employees, giving one binding arbitration, the second a limited right to strike, and the third, the unlimited right to strike. Teachers, however, were specifically excluded from the provisions of the act. Not surprisingly, they sued. The state's supreme court cited common law precedent throughout the states which establishes clearly that, in the absence of specific legislative permission, public employees have no right to strike. Excluding teachers from the legislation was found to be constitutionally valid, inasmuch as it was substantially related to the purpose of

22. Wolkenstein v. Reville, 539 F. Supp. 87, 94 (W.D.N.Y. 1982).
23. Nassau Educ. Chapter of Civil Serv. Employees' Ass'n v. Great Neck Union Free School Dist., 454 N.Y.S.2d 67 (N.Y. 1982).

ensuring the continuation of a government service. According to the court's reasoning, "It is permissible for the legislature to have found that teachers, although necessary to the functioning of society so as to forbid strikes, were not so essential as to require compulsory arbitration."[24]

In the lone clear-cut constitutional victory for teacher plaintiffs against state law, graduate assistants in Florida were successful in convincing a court that their exemption from collective bargaining legislation was not related to a compelling state interest. They were permitted, under state constitutional equal protection guarantees, to organize and bargain collectively.[25]

Constitutional claims that labor relations legislation in the public sector is unconstitutional, per se, arise from time to time. For example, a Wisconsin case challenged the foundational constitutionality of the state's long-standing and pioneering municipal labor relations statute. Milwaukee County argued that the law was unconstitutional because (1) local (county) legislative matters are constitutionally required to be decided by a county board of supervisors; (2) the binding arbitration required for impasse resolution is not accountable to the electorate; and (3) the statute fails to provide for meaningful judicial review.[26]

The court applied three standards to test the claims: (1) Is the legislative purpose ascertainable; (2) are there sufficient safeguards to limit the exercise of power; and (3) are there adequate procedural and judicial safeguards? Affirming the first standard was quite easy—promoting voluntary settlement of labor disputes through collective bargaining and, failing this, resolution of impasse without resort to strikes or other work stoppages were found to be in the public interest. The second test was met by noting that the law limits arbitrators to considering only eight factors (among them, comparable settlements in neighboring districts and cost-of-living data) when making judgments. For the third, the court noted that judicial review, though admittedly limited by the law, was adequate. It commented on the necessity of preserving "the important principle of finality in labor arbitration"[27] and found that judicial review was sufficiently available via a party refusing to abide by an arbitrator's decision, hence triggering a commission hearing, the outcome of which would be appealable to judicial review. It went on to note that to accept the employer's claim, it would have to review the wisdom of the legislation rather than its constitutional validity. This, it declined to do, asserting that "a delegation of authority designed to achieve proper balance between direct political accountability and independence from the political process does not violate constitutional principles."[28]

In Kansas, on the other hand, an employer was successful in convincing a court that the state's professional negotiations act did not grant the secretary of the department of human resources the power to order reinstatement of a discharged teacher. The court commented that had the legislature granted such authority it would amount to an unlawful delegation under the state's constitution. Teachers, however, were not left without an avenue of redress, for the statute provided for a series of due process hearings which were held by the court to be the exclusive remedy. The secretary's capability to determine educational policy and practice was to this extent limited.[29]

The paucity of constitutional decisions is best explained by the federal judiciary's reluctance to accept jurisdiction. In dismissing a nonduespaying teacher's claim against his association for deciding against pursuing his claim for past overtime wages all the way to arbitration because it "lacked merit," a federal district court in Florida forcefully explained when federal jurisdiction should not be invoked. (The teacher had also filed for relief in the state courts.)

> Abstention is appropriate where a state law is involved which is susceptible to an interpretation that would modify or avoid the federal issue, and resolution of the federal issue depends upon the interpretation to be given state law and the issue of state law is uncertain or unclear. . . . This Court believes that it would be placing the cart before the horse if it were to grant jurisdiction on plaintiff's federal constitutional claims that are so inextricably intertwined with the operation of the state statute in question and may be resolved in the state court proceeding now pending. . . . Its provisions are best interpreted by Florida courts. Accordingly, this Court believes it should in this instance abstain, stay its hand and not attempt to "forecast" on this potentially important issue of state law.[30]

3.2 AUTHORITY TO BARGAIN

In Ohio, where bargaining is optional, a board was not permitted to select with which of two competing units it would bargain. The problem

24. Anchorage Educ. Ass'n v. Anchorage School Dist., 648 P.2d 993, 997 (Alas. 1982).
25. United Faculty of Florida, Local 1847 v. Board of Regents, State Univ. Sys., 417 So. 2d 1055 (Fla. Dist. Ct. App. 1982).
26. Milwaukee Cty. v. American Fed'n of State, Cty. and Mun. Employees, Dist. Council 48, 325 N.W.2d 350 (Wis. 1982).
27. *Id.* at 357.
28. *Id.* at 358.
29. Unified School Dist. No. 251 v. Secretary of Human Resources and North Lyon Cty. Teachers' Ass'n (Kan. Dist. Ct., Lyon Cty. 1982).
30. Galbreath v. Broward Cty. Classroom Teachers' Ass'n, 540 F. Supp. 245, 248, 249 (S.D. Fla. 1982).

arose when the board chose to bargain with a unit which was both more tractable (the superintendent was its president) and the choice of a minority of the employees. The court ruled that, where another employee organization exists which represents a majority of the employees, the board must negotiate therewith—if it elects to bargain at all. The voluntary provisions of the law were found not to permit a board to deny teachers the agent of their choice.[31]

Authority to bargain became an issue in Kentucky when a county board decided to bargain collectively if a poll of the employees indicated a majority to be so disposed. The poll revealed the teachers to be in favor, and the agreement that was bargained included an exclusive recognition clause. A private citizen sued, complaining that she was not permitted to participate in the process, a right she asserted arose from her status as a taxpayer. The court ruled that though the legislature had granted the board the option of bargaining, it had not granted the authority to enter into an exclusive agreement.[32] In Massachusetts an administrators' union attempted to bargain for seniority rights for two administrators demoted into the teachers' unit. The PERB ruled that one union cannot bargain for rights conferred on members of another.[33] In Oregon a court ruled that, although prior to a valid representation election an employer is under no obligation to bargain, the voluntary recognition provisions of the state's law makes ERB certification unnecessary so long as the unit recognized represents a majority of the employees.[34]

3.3 RECOGNITION OF UNIONS AND REPRESENTATION PROBLEMS

3.3a Unit Determination

3.3a(1) Supervisory, Managerial, and Confidential Employees

In Washington, a board unilaterally removed certain members from the bargaining unit mid-term in the contract. The PERC ruled that, absent a showing of "substantial changes" in the duties of a position or notice to the unit of its intentions prior to signing the agreement, the board's action was prohibited.[35]

31. Ohio Ass'n of Pub. School Employees v. Bexley City School Dist. Bd. of Educ., 440 N.E.2d 622 (Ohio Ct. App. 1982).
32. Fayette Cty. Educ. Ass'n v. Hardy, 626 S.W.2d 217 (Ky. Ct. App. 1980).
33. Massachusetts Labor Rels. Comm'n Case No. A0-4 PEB ¶ 42,708.
34. Reynolds School Dist. v. Oregon School Employees' Ass'n, 650 P.2d 119 (Or. Ct. App. 1982).
35. Washington PERC Case No. 2165-C-79-99 PEB ¶ 42,611.

3.3a(2) Other Issues Regarding Recognition and Representation

Recognition from time to time is disputed based on the qualifications for membership in the unit. In Michigan, a district refused recognition of a single bargaining unit for cafeteria, custodial, maintenance, and supply employees because of the wide differences in their wages, fringe benefits, and working conditions. The PERC had ruled against the district, which then litigated. The court found that the differences, though obvious, were "arguably merely the result of different bargaining histories" of formerly separate units. Consequently, ruled the court, these differences did not militate against the employees forming into a common bargaining unit.[36] A Wisconsin court of appeals has affirmed a lower court's ruling in 1981 that the state's PERC had abused it discretion by excluding intern teachers from a bargaining unit. The key to this decision is the fact that intern teachers do not function in the standard student-teacher mode. They hold full-time teaching contracts that are one semester in length.[37]

The status of part-time employees creates recognition problems as well. In Washington a board refused to recognize a unit because some of its members worked less than full time. The PERB ruled that employees who work twenty consecutive or thirty accumulated days were properly admitted to bargaining unit membership.[38] In Pennsylvania, a court ruled that long-term substitutes were properly included in a teachers' bargaining unit where it was found that sufficient community of interest existed to justify the state's PERB ruling.[39]

Who is protected by the bargaining agreement was litigated in Washington, when a half-time employee who was not properly certified was not appointed to a full-time position as required by the agreement. The court found that the agreement stipulated that the district employ only properly credentialed persons, and the plaintiff, it turned out, did not have the proper certification. Hence, he was not protected by the agreement.[40]

In Oregon, a dispute arose over whether a unit was properly certified. The state employee relations board, under a request to clarify who could be members of the unit, added new members without an election. However, the district contended that the newly constituted

36. Lansing School Dist. v. Michigan Employment Rels. Comm'n, 324 N.W.2d 62, 65 (Mich. Ct. App. 1982).
37. Arrowhead United Teachers' Org. v. Wisconsin Employment Rels. Comm'n, 321 N.W.2d 242 (Wis. Ct. App. 1982).
38. Washington PERC Dec. No. 1189-A-EDUC PEB ¶ 42,763.
39. School Dist. of Twp. of Millcreek v. Millcreek Educ. Ass'n, 440 A.2d 673 (Pa. Commw. Ct. 1982).
40. Johnson v. Central Valley School Dist. No. 356, 645 P.2d 1088 (Wash. 1982).

unit did not have to be recognized inasmuch as it had not achieved its status by election, as required by law. The court ruled that the proper way for a board to remedy a suspect unit is to refuse to bargain with it, thus inviting an unfair labor practice and subsequent administrative proceedings.[41] The importance of proper recognition and certification was underscored in a California case that found a number of employee organizations without standing to file charges of unfair labor practies against a district with the PERB. The court found that none of them had achieved, as required by law, recognition and certification as exclusive representatives hence PERB had no jurisdiction in their dispute with the district. Pending such certification, a school board was not prohibited from bargaining with all competing organizations.[42]

In a 1980 Ohio case that was published in 1982, a court held that fifteen years of satisfactory representation were sufficient to indicate a union's adequacy as the bargaining agent even though it had never been recognized through a formal election. The court used equity to find that although thirty-six percent of the employees had requested a change in representative, this was insufficient to "require the school board to hold the requested election, there being insufficient evidence to establish that a 'significant number of employees' wished to be represented by a different union."[43]

Perhaps the most interesting recognition issue arose in North Dakota. It should receive some sort of an award for being the most unusual bargaining dispute of the year. Ms. Nancy Loney, the only teacher employed by the Grass Lake Public School District, wanted to be certified as the negotiating unit under North Dakota's employee relations statutes. The board had refused to negotiate with her under these terms, claiming that the law's definition of an appropriate negotiating unit as being a "group of teachers" excluded her from its provisions. The court agreed that there was some ambiguity as to whether the statute meant to include single employee units, but concluded that the law contained

> an implied intent by the legislature to allow all certificated teachers in this state an opportunity for negotiations. . . . [W]e will not strain to reach a contrary interpretation when there is no clear indication that single-teacher school districts are excluded merely because two or more teachers are technically a "group of teachers" whereas one teacher is not.[44]

41. Reynolds, *supra*, note 34 at 122.
42. El Rancho Unified School Dist. v. National Educ. Ass'n, 180 Cal. Rptr. 809 (Cal. Ct. App. 1982).
43. Ohio Ass'n of Pub. School Employees, v. Cincinnatti Bd. of Educ., 437 N.E.2d 1210, 1212 (Ohio Ct. App. 1980).
44. Loney v. Grass Lake Pub. School Dist. No. 3, 322 N.W.2d 470, 473 (N D. 1982).

One advantage of the arrangement possibly overlooked by the board, which, incidentally, was willing to "meet and confer" with her is that they will have little dispute over exclusive representation practices and fair-share service fees.

3.3(b) Elections

The validity of a given election is seldom challenged all of the way into courts of record. The United States Department of Labor, however, prevailed against the Illinois Education Association in a challenge to its election procedures. The by-laws of the association guaranteed four ethnic minorities eight percent of the seats in its representative assembly and four seats on the board of directors. The Department of Labor alleged that the arrangement, even though motivated by affirmative action goals, violated the Labor Management Reporting and Disclosure Act, which requires that every election be held by secret ballot and that every member in good standing must be eligible to be a candidate for each office.[45]

From time to time, however, allegations of improper elections are made. In Washington, one was challenged on the basis of improper seating of union observers at balloting. An arbitrator ruled that inasmuch as the violation had not been called to the attention of the PERC official present at the voting, the matter was insufficient to invalidate the election results.[46] In Vermont, a problem arose when a tie vote in a two-party election occurred. The association wanted a run-off whereas the district claimed that since no unit had been designated by majority vote, there was no proper organization with which to bargain. The PERB agreed with the board, ruling that a run-off would be improper because the law limited the outcomes of a certification election where only two contenders existed, to one of but two decisions—agent chosen or agent not chosen. In a tie vote, therefore, "agent not chosen" was the only conclusion possible.[47] In Florida, an association wanted absentee ballots provided in an election for the convenience of its members. The board refused to cooperate and the PERB upheld, finding that the association failed to demonstrate that any teacher would be unable to vote at on-site polling.[48] A Pennsylvania trial court set aside a representation election when it found that the labor relations board notice of election and voter eligibility failed to

45. Donovan v. Illinois Educ. Ass'n, 667 F.2d 638 (7th Cir. 1982).
46. Washington PERC Case No. 3339-E-81-645, Dec. No. 1139-PECB PEB ¶ 42,586.
47. Vermont Labor Rels. Bd. Dec. No. 80-50 PEB ¶ 42,668.
48. Florida PERC Case Nos. RC-82-009, RC-82-010; Order No. 82E-381, PEB ¶43,051.

reach twenty-six employees who were eligible to vote.[49] In Ohio, a trial court order that an election be held between two unions vying to represent clerical employees was overturned. Among other errors, the appellate court found inadmissable the approximately 330 authorization cards requesting a change in representation because only three employees testified as to the validity of their signatures. The court found that the procedure used to acquire the signatures did not lend itself to further verification.[50]

Charges of unfair attempts to influence the outcomes of certification elections sometimes arise. Most are settled by PERB rulings, such as in a Florida case where, during a certification campaign, a school board representative posted a notice in the teachers' room stating that "some employees could lose their jobs or benefits if the union comes in."[51] The PERC ruled this to be threat, intimidation, and improper interference with the election—an unfair labor practice. On the other hand, a Michigan court has ruled that a public employer (not, incidentally, a school) may expend public time and money to express its views opposing the organization of a union. Union claims of first amendment infringement were held to be without merit. The court noted that

> first of all, it is important to recognize that no provision of the PERA contains an express or implied prohibition against the expression of views by a public employer. Therefore we are left with little indication of the Legislature's intent in this regard. The omission of such a provision may have reflected an intent to permit *broader* rights of expression than the NLRA or this omission may indicate that the Legislature intended significant restrictions on the scope of expression.
>
> Secondly, we note that the purpose of the PERA is to protect the organizational rights of employees, which include the right to organize and the right not to organize.[52]

Expressing grave doubts about the constitutionality of a statute that would prevent a public employer from expressing an opinion regarding organization of a union, the court concluded that public employers in Michigan were permitted to express views opposing union organization so long as they do so without intimidation, coercion, or misrepresentation. The conjoint rights of all parties, according to the court can be "best served by permitting the free flow of information from both

49. Bucks Cty. Schools Intermediate Unit No. 22 v. Commonwealth of Pa., No. 81-05329-12-6 (Pa. C.P. Bucks Cty. Ct. 1982); PEB ¶ 37,568.

50. Ohio Ass'n of Pub. School Employees v. Cleveland City Bd. of Educ., 430 N.E.2d 1335 (Ohio Ct. App. 1980).

51. Florida PERC Case No. CA 81-056, Order No. 82U-031, PEB ¶ 42,765.

52. Local 79, *supra*, note 9 at 651.

both union and employer to prospective union members. Such a dynamic interplay of opposing views is most likely, in our belief, to ensure that each employee can make an informed choice on the representation issue."[53]

3.4 RIGHTS AND OBLIGATIONS OF EXCLUSIVE BARGAINING REPRESENTATIVES

3.4a Union Rights

Collective bargaining units devote much energy and resources to maintaining themselves in power. Agreements which guarantee that they will be the exclusive bargaining agents are, therefore, extremly important to them. Though the principle of exclusive representation is well-set, disputes between union or association rights and the rights of others are inherent in such arrangements. As reviewed in section 3.1, *supra*, these disputes generate considerable litigation regarding individual rights as opposed to organizational support. This section reviews the details of those decisions in addition to discussing nonconstitutional cases to provide insight into what may be accomplished without risking constitutional or statutory challenge.

In general, exclusive agreements seem to be valid, based, as they are, not only upon statutes in realms of legitimate state action, but also upon basic concepts of democracy and majority rule. Restrictions on the activities of minority, or nonmembers, however, are quite another matter, and usually receive strict judicial scrutiny. Unless the state can show some compelling relationship to a legitimate interest, such as promoting labor peace, or the ability of the majority unit to fulfill its statutory duties and obligations to its membership, restrictions on the actions of minority groups, including dissident individuals, are unlikely to stand. Thus have minority unions been given the right to speak and utilize employer bulletin boards. In the Dade County, Florida, case discussed earlier (section 3.1) the Fifth Circuit Court of Appeals found a minority unit, the Dade Teachers' Association, on the receiving end of restrictive practices. It had been denied access to potential members by having its notices removed from bulletin boards, and its members were not permitted to enter school parking lots after school to distribute literature. These actions, though ostensibly taken by board officials pursuant to policies regarding protection of students and teachers from outside interference and to promote campus security, were actually taken at the insistence of the majority unit. The court

53. *Id.*

reviewed the facts of the dispute in light of precedent both in public and private sector cases, and concluded, citing an earlier decision, that

> absent extraordinary circumstances, a public employer may not restrict the rights of employees to discuss organizational interests at the work site during the employees' non-work time, nor restrict distribution of literature during work except where the actual work of public employees is performed. Here, the School Board's policy precluding at all times and in all cases employees (other than UTD agents) from one job site entering another job site for purposes of soliciting other employees for membership in an employee organization is presumptively invalid.[54]

This ruling shifted the burden of proof to the school district to demonstrate that the restrictions were justified. The court's examination of the record revealed no justification, and it reviewed the facts presented with a hint of impatience and incredulity.

> While sympathetic to the School Board's concern for the safety of its students and teachers, we find that it has simply failed to show that a blanket no-access rule is the only means available, or even a reasonable means, of protecting this interest. No evidence was introduced to show that solicitation by employees from other campuses increased the schools' security problems. Indeed, the rule on its face permits solicitation by representatives of the majority union, indicating that the policy is designed to protect UTD's "exclusivity" rather than the safety of children, and is discriminatory in nature. (Although the School Board contends that security is hampered by unknown teachers at school parking lots, it does not suggest that UTD supporters are more easily recognizable than DTA advocates, thus undercutting "security interests" as a justification for the rule.)
>
> Additionally, while the school system has had increased crime problems in recent years, there is absolutely nothing in the record that ties these problems to school employees, much less teacher's soliciting union memberships. The presence of additional teachers in the parking lots after school hours would seem, if anything, to be a deterrent to crime.
>
> Appellants contend, in essence, that allowing DTA supporters to use the employee's general purpose bulletin board will endanger harmony and cause friction among employees. Aside from the irony of a union advancing such an argument, the argument proves too much. For better or worse, the law—

54. Dade County, *supra*, note 5 at 648.

> not to mention the First Amendment—allows public employees to communicate and solicit each other for collective bargaining purposes even though such conduct often leads to disharmony and friction.[55]

In the Alabama case also discussed earlier (section 3.1), the certified association found itself on the receiving end of restrictive practices. The association had tried to disseminate opposing position papers and organize meetings of teachers to protest the adoption of the board's planned minimum competency testing program for teachers. Some of the district's administrators had permitted the activities; some had not. On the other hand, board-sponsored testimonials for the project were widely disseminated. This practice, according to the court, effectively compromised the board's contention that the proscriptions were necessary to prevent disruption.

> The problem lies in the fact that there was no difference between the possible disruptive effects of the Board's communications and the MCEA's communications on the subject in controversy. They differ only in the positions taken. School administrators and principals may not permit one side to promote its position while denying the other side the same opportunity.[56]

Further reason to deny the practice was found in the district court's lament that "here we have college educators straying all over the field by their various interpretations of the written policies." This problem was so pervasive, noted the court, that "it should be particularly noted that the policies have not been ruled invalid because they require prior submission and prior approval. Rather, this decision turns on the fact that, as written, they do not furnish sufficient guidance to prohibit the unbridled discretion that is proscribed by the Constitution."[57]

With individual dissidents, however, another matter presents itself. A New York court found that a district's refusal to grant an individual teacher access to the internal mailing system did not violate equal protection guarantees because such violations can occur only where "similarly situated" parties are treated differently. Sufficient difference was found between an individual teacher (all individual teachers wre similarly denied access) and an organization to justify the regulation, using the rational, rather than the more stringer, compelling interest standard.[58]

55. *Id.*
56. Hall, *supra*, note 7 at 988.
57. *Id.* at 969 and 971.
58. Werner, *supra*, note 6.

In Massachusetts a union's right to decide how best to serve its members prevailed over an individual's claim that it had inadequately pursued a complaint. The court denied damages the member sought against the union for failure to pursue vigorously a grievance regarding her performance evaluations. The court cited precedent that, absent "lack of a rational basis for a union decision and egregious unfairness or reckless omissions or disregard for an individual employee's rights," a union's decisions on the best method of protecting an individual's interests were to be sustained.[59] A federal district court in Florida has ruled similarly, permitting the union's decision to decline pursuit of a grievance all the way through to arbitration and the board's refusal to process the individual grievance (both upheld by the PERB) to stand, pending a state appellate court decision.[60] The Fifth Circuit Court of Appeals has ruled that a teachers' association has the right, as the agent of its members, to make decisions regarding them. A teacher had claimed that direct notice to a policy-holder was necessary before any changes in coverage agreed to by the association would be properly in force. The court disagreed.[61]

An associaton's rights, however, were found *not* to extend to ownership of money in treasury of local unit that had withdrawn from affiliation. The ruling came despite the unusual method the local unit had adopted to transfer the funds to a competing organization—drawing checks to members for "negotiating" and "public relating" expenses even though everyone knew there had actually been no such expenses.[62]

3.4b Union Security

Union security is frequently reflected in the litigation that associations both initiate and receive. Such disputes most often arise from so-called fair share agreements wherein nonmembers are required to pay a service fee to the association for the costs of representation and these fees are deducted from nonmembers' salaries through mandatory dues check-off agreements. Though the concept of service fees has clearly been found constitutional by the Supreme Court, legislation establishing the procedures must be carefully drawn to avoid constitutional violations through deprivation of property without due process of law. Implementation of the practice differs widely, as does its judicial reception. The issues most in dispute are the determination of

59. Tringue v. Mount Wachusett Commun. College Faculty Ass'n, 437 N.E.2d 564 (Mass. Ct. App. 1982).
60. Galbreath, *supra*, note 30.
61. Peel v. American Fidelity Assurance Co., 680 F.2d 374 (5th Cir. 1982).
62. Illinois Educ. Ass'n v. Illinois Fed'n of Teachers, 437 N.E.2d 1265 (Ill. 1982).

the amount of the fee to be collected, and the manner in which nonpayment is to be treated.

An association in Massachusetts encountered district refusal to accede to its demand that two nonpaying employees be discharged. The association then developed an alternative plan, which was to have nonmembers pay the entire fee, then seek refunds through state and national association appeals. In exchange, the association agreed to drop its demand for the affected employees' discharge, and promised to place the fees into an escrow account under the association's control so the funds would always be available, no matter what the eventual outcome. The service fee was set at $150 per year; full dues were $158. The teachers declined the compromise and the school committee continued to refuse to discharge them. The association grieved the matter, and it eventually made its way into the state's supreme judicial court. The issues, as presented by the court did not hinge on the constitutionality of the service fee, but on the problem that

> requiring a dissenting employee to resort to the type of internal rebate procedure involved in this case . . . would undermine the burden that the Supreme Court in *Allen* and *Abood* has explicitly placed on the association of justifying the fee it assesses whenever a general obligation is entered. This burden is only meaningful if legitimacy is proved before a neutral tribunal and subjected to judicial review. An initial determination by the association followed by arbitration (before an arbitrator who may or may not be expert in organization expenses and accounting) followed by limited judicial review . . . are simply insufficient to guarantee that the onus of justification remain at all times on the association.[63]

The teachers, nevertheless, did not escape paying a service fee. The court directed that they, and any dissenting employee may be required to

> pay the disputed fee into a neutral escrow account pending adjudication . . . [and has] the option of bringing a prohibited labor practice complaint before the Labor Relations Commission if the employee wishes to challenge the fee amount. The commission may require the employee to pay the disputed fee into an escrow account, but may not require that it be paid to the organization until the commission has determined the permissible fee. Once the employee has brought a complaint, the burden of justifying the fee as permissible must rest on the organization.[64]

63. Greenfield, *supra*, note 18 at 188.
64. *Id.*

In New Jersey, however, a federal district court has taken a more restrictive approach to the assessment and collection of the fees. There, the power of the state to enact legislation requiring payment of service fees was affirmed, but the law under challenge was not, because it failed to differentiate between representation costs, costs of political lobbying, and "ideological" activities of the association. The court set the standard for the legitimacy of such fees as including (1) they must not be used for political lobbying over and above lobbying designed to secure agency or legislative action required to implement a collective bargaining agreement, and (2) the association must have the burden of establishing a proper representation fee. The court was adamant about the latter, commenting that

> the more one examines the facts and the realities of the situation, the more one becomes convinced that the potential for serious constitutional deprivations will exist unless the organizations receiving the fees are required to establish in advance of payment the amount required to reimburse them for services rendered for collective bargaining, contract administration and processing grievances. The burden must be on them to establish this amount with detailed financial and other appropriate data which satisfies some impartial body capable of analyzing the data.[65]

A court in New York was similarly sympathetic to an individual's claim for an accounting of the disposition of service fees. A union's refusal to provide financial information adequate to justify the amount of refund offered a nonmember was found to be adequate basis for the PERB's ruling that required divulgence of certain financial data.[66] In Kentucky, the matter was definitively resolved by the Sixth Circuit Court of Appeals. In a lengthy decision which extensively discussed various ramifications of combining political action contributions with dues check off procedures, it upheld a district court's ruling that a reverse check-off plan of forwarding payments to the state's education political action committee does not violate constitutional rights of employees. The Kentucky registry of election finance had found the practice of automatically withholding a specified sum from dues check-off unless an employee signs a waiver of such contribution, to be in violation of the state's statute forbidding "assessment" or "coercion" in political contributions. The political action committee appealed the ensuing order to cease the practice to the federal district court, which issued an injunction against the registry because it found that the purposes of the

65. Robinson, *supra*, note 14 at 1323, 1324.
66. United Univ. Professions v. Newman, 446 N.Y.S.2d 596 (N.Y. 1982).

practice were well known to all employees and that no evidence of coercive practice or constitutional violation existed.

> Inertia of a person to take a step to see that his money is not being used for political purpose, does not deprive him of the right to take that step and cannot be logically interpreted by Registry as coercion.... There is not a shred of evidence in the record to indicate that the employment of any KEA member was jeopardized or appeared to be jeopardized by failure to contribute to KEPAC.[67]

In the absence of legislation which provides automatic fee check-off from nonmembers, associations resort to various means to produce payment. Most usual is demand for dismissal, which is often recognized by statutes and agreements as a legitimate choice to present the teachers. In California, however, an association's attempt to employ penalties short of dismissal was thwarted. It had successfully bargained the following into its agreement:

> [A]ll employees in the unit shall either join the Association or pay to the Association a service fee in an amount not to exceed the regular dues and general assessments required for membership.... [T]he association and not the district shall be responsible for requiring employees to fulfill their obligation.[68]

Based on this provision, it filed suit in small claims court to recover fees from nonpaying members of the unit. The small claims court ruled in favor of the association, as did a county superior court, which convened a de novo trial. The case was then transferred to the California Court of Appeals, which reversed. The court noted that the code defined organizational security in two parts: (1) that employees may decide to join, not join, or to terminate membership once joined; and (2) an arrangement which requires an employee as a condition of continued employment either to join the recognized union or pay the service fee. Taken together, reasoned the court, these definitions validated the dissenting teacher's argument that the agreement did not provide for dismissal as the penalty (as required by the statute) hence the association was foreclosed from using any other means, including filing civil suit. The court further noted that, where organizational security as defined in the statutes was made part of the agreement, the limitations of the statutory definition prevail: "[N]othing in the Rodda Act permits negotiation of a so-called organizational security agreement

67. Kentucky Educators' Pub. Affairs Council v. Kentucky Registry of Election Fin., 677 F.2d 1125, 1129, 1134 (6th Cir. 1982).
68. San Lorenzo Educ. Ass'n v. Wilson, 179 Cal. Rptr. 25, 26 (Cal. Ct. App. 1982).

which is not a condition of continued employment but which purports to subject non-member employees to civil suit or any other form of what may be characterized as harrassment or possible discriminatory treatment."[69]

In Ohio, a teacher attempted to avoid service fees which were set at fifty percent of a regular member's dues, by claiming that he was being forced to pay for a service that he neither wanted nor needed. Further, he claimed, the service fee violated his annual employment contract, since it had been executed prior to the board's agreement with the association requiring the fees as a condition of continued employment. The court affirmed both the association's and the board's positions, finding the agreement to bargain exclusively with one unit not unreasonable. Further, the court found that the teacher's annual contract did not bind the board against making managerial decisions that would result in changes in a teacher's take-home pay. The teacher was ordered to submit the required fees to the association or suffer the penalty, although a dissent argued that the statute did not contemplate involuntary deductions.[70]

After lengthy consideration which has included examination by both the United States and the state supreme courts and legislative modification, Minnesota's fair-share fee statute has been declared constitutional. Key to the decision was an amendment providing for prior notice of the "fair-share" amounts, and hearing procedures to determine their validity.[71]

3.4c Obligations of the Exclusive Representative

Though it may sound tautological, the exclusive representative is obliged to represent the interests of its members (broadly defined). Though it may do more, such as engage in political action, it is obliged not to do so with monies collected for representational purposes (*see supra*, section 3.4b). This obligation is not as straightforward as it might seem, however, for any organization encounters strain between its pursuit of the collective good and individual members' perceptions of their personal advantage. This occurs in union or association business when the organization refuses to pursue a grievance with all the vigor an individual might desire. Thus the obligation is not a promise to every member to pursue his or her complaint to the limit. The legal status of the individual claims as opposed to the union's obligation to pursue them was best reflected in a nonschool case wherein the court

69. *Id.* at 29.
70. Jefferson, *supra*, note 10.
71. Threlkeld v. Robbinsdale Fed'n of Teachers Local 872, AFL-CIO, 316 N.W.2d 551 (Minn. 1982).

ruled that no individual employee has the absolute right to have a grievance arbitrated. Absent "arbitrary, bad faith, or discriminatory treatment," the union's decisions will be considered "fair representation."[72] Similarly, a school employee in New York was found to have no standing under his collective bargaining agreement to request arbitration for himself when the union declined to pursue the matter.[73]

3.5 SCOPE OF BARGAINING

School boards are typically reluctant to bargain any more than is absolutely necessary, partially because legislation enabling it has often been initiated or sponsored by groups favoring organized labor, and partially because limits are always placed on their duty or permission to do so—usually expressed in terms of "wages, hours, and conditions of employment." These limits, however, have not definitively clarified the scope of bargaining for the concept of "conditions of employment" is potentially so broad as to jusitfy a claim that virtually everything that influences an employee in any way whatsoever is bargainable. Neither boards nor courts have accepted such an expansive definition of the phrase, however; consequently there has developed a considerable body of decisions on what may be bargained. Out of these decisions, three things have clearly emerged: (1) Where the statutes require bargaining, boards have a duty to do so and must do so in "good faith;" (2) where bargaining is not expressly permitted by law, boards may not formally engage in it; and (3) where bargaining is merely permitted, boards may elect whether or not to participate in it, and once begun, may terminate the process at any time.

A court in New Jersey felt compelled to review the matter one more time, even though there is little doubt that by now everyone involved in public sector bargaining has heard of the three rubrics—mandatory, permissive, and forbidden subjects—which ostensibly define the scope of bargaining. It described them thusly:

> Mandatory subjects are those which the employer must negotiate if requested by employees' representative. Permissive or voluntary subjects are those which the parties may negotiate if they do not place substantial limitations on government's policy-making powers. Finally, illegal subjects are those which the parties are forbidden to negotiate because the subject matter is controlled by other statutes or regulations that permit no discretion on the part of the employer.[74]

72. Jarnigan v. Teamsters' Local 519, 548 F. Supp. 25 (D. Tenn. 1982).
73. East Ramapo Cent. School v. Symanski, 456 N.Y.S.2d 22 (N.Y. App. Div. 1982).
74. Teaneck Bd. of Educ. v. Teaneck Teachers' Ass'n, 448 A.2d 487, 489-490 (N.J. Super. Ct. App. Div. 1982).

3.5a Duty to Bargain

Attempts to escape statutorily-established duty to bargain by attacking the constitutionality of the legislation itself were reviewed in section 3.1; there seems little chance that such efforts will succeed. The current attitude of courts toward allegations of disparity between various constituional principles and legislation enabling public sector bargaining was well-described by the Supreme Judicial Court of Massachusetts which simply asserted that "it is our duty to construe statutes so as to avoid such constitutional difficulties if principles of good interpretation permit it. . . . Where the draftsmanship of a statute is faulty or lacks precision it is our duty to give the statute a reasonable construction."[75] A federal district court in Florida adopted the same stance, stating that where labor disputes are "susceptible to resolution so as to render unnecessary a decision of the federal constituional questions. This Court will not at present decide plaintiff's constitutional claims on their merits."[76]

Consequently, questions regarding the scope of bargaining are resolved largely through examination of statutory law and the common law duties which arise from enabling legislation. The latter essentially comprise the definition of "good faith" bargaining, which usually is interpreted to refer to the willingness of both sides to discuss a subject, to make reasonable concessions to the other, to refrain from interfering with the other side's decision-making, and to abide by an agreement, once made. Not fulfilling a duty to bargain, therefore, can appear in the form of simply refusing to meet, or in taking actions which influence the proceedings in such a way as to discourage agreement, or both. In California, a board did both. It refused to reopen negotiations after impasse had been reached and a fact-finding report issued. It also unilaterally implemented a salary package that was substantially different from the last offer it had introduced prior to impasse. Its position was based partially on the law, which defined duty to meet and negotiate in terms of requiring the parties to "begin negotiations prior to the adoption of the final budget . . . so that there is adequate time for agreement to be reached, or for the resolution of impasse." The board claimed that since the budget deadline had passed, the duty to bargain no longer existed. It also claimed the invocation of fact finding to be a signal that negotiations were at a nonrevokable impasse. The teachers shortly went on strike, and both sides filed for unfair labor practice rulings with the state's PERB. The ensuing investigation resulted in the issuance of an injunction against the board's refusal to

75. Greenfield, *supra*, note 18 at 186.
76. Calbreath, *supra*, note 30 at 248.

reopen bargaining conditioned on the teachers returning to work. The district appealed and learned that the California Court of Appeals was highly supportive of the law's intent that labor disputes be settled through bargaining, not litigation:

> Under district's rationale, as soon as mediation and fact-finding are completed, the duty to negotiate in good faith evaporates. We find no authority supporting this contention nor do we find any authority which would compel us to implement section 3549 giving district the right to refuse to bargain after post-fact-finding concessions made by Association.[77]

The appellate court also found the district's implemented salary package sufficiently different from its last offer to constitute a violation of the principle that

> an impasse is a fragile state of affairs and may be broken by a change in circumstances which suggests that attempts to adjust differences may no longer be futile. In such a case, the parties are obligated to resume negotiations and the employer is no longer free to implement changes in working conditions without bargaining.[78]

In Delaware, an employer tried to avoid bargaining by refusing to continue discussions with a unit that had a petition for reorganization pending. The court ruled that the employer was required to bargain with whatever certified unit existed at the time. What might or might not be the outcome of a reorganization petition had no bearing whatever on the unit's current legitimacy.[79] A board in Indiana was found to have no duty to bargain an issue that affected only one teacher. The association had tried to inject the nonrenewal of the teacher into contract negotiations, citing the statutory mandate to discuss "selection, assignment or promotion."[80] Duty to bargain was extended by a Maine court to include the employer's obligation to notify a union of its willingness to bargain if the subject was a mandatory subject of bargaining.[81]

77. Public Employment Rels. Bd. v. Modesto City Schools, 186 Cal. Rptr. 634, 646 (Cal. Ct. App. 1982).
78. *Id.*, *citing* Gorman, *Labor Law* (1976) at 449.
79. Council 81, AFSCME v. State Dep't of Health and Social Servs., 449 A.2d 271 (Del. Super. Ct. 1982).
80. Indiana Educ. Employment Rels. Bd. v. Carroll Consolidated School Corp. Bd. of Trustees, 439 N.E.2d 737 (Ind. Ct. App. 1982).
81. City of Bangor v. American Fed'n of State, Cty., and Mun. Employees Council 74, 449 A.2d 1129 (Me. 1982).

3.5b Interrelationship with Other Laws

The inherent complexity of bargaining and the fact that, over the years, many bargainable topics have received direct legislation leads to continuing conflict between bargaining statutes and other laws. Perhaps the chief source of interrelationships and conflict, though by no means the most clearly delineated, is the inherent incompatibility between traditional broad grants of authority to boards to manage the schools, and the subsequent limits placed on that authority by the sharing of power inherent in collective bargaining. When a board agreed to layoff procedure that reduced its discretionary power to transfer teachers, a court in Illinois expressed the matter thusly: "[W]hile a school board may enter into a collective bargaining agreement with a teachers' union, the board cannot, by such an agreement, delegate or limit its statutory powers and duties."[82] A New York court ruled similarly, finding that, provisions of the agreement notwithstanding, an arbitrator exceeded his authority when he directed the board to reinstate a grievant to a position from which the board had transferred him.[83] Cases where certification or tenure are involved are other examples of areas where such agreements are not typically permitted. Here, the common law that public employers and employees may not agree to contractual terms that contravene specific terms or conditions of employment set by statute prevails. A New Jersey court ruled specifically that Title I and other nonlocally funded teachers cannot be denied tenure by terms of the collective bargaining agreement: "The legislature has explicitly mandated that teachers be granted tenure under certain conditions as a means to improve public education. Neither school boards nor teachers are free to disobey that mandate. Tenure is not dependent on agreement betwen the parties."[84] In California, a section of a collective bargaining agreement providing certain qualifications for extended sick leave benefits was found in conflict with the education code and was severed.[85] In Wisconsin, the limitation on bargaining topics that are covered in statutes is so well recognized that legislation implemented in 1982 grants expressed permission that a "collective bargaining agreement may modify, waive, or replace" any provisions of the state's nonrenewal, dismissal, and tenure legislation.[86]

82. Wilfong v. Collinsville Unit School Dist. No. 10, 438 N.E.2d 225, 228 (Ill. 1982).
83. Sweet Home Cent. School Dist. v. Sweet Home Educ. Ass'n, 455 N.Y.S.2d 685 (N.Y. App. Div. 1982).
84. Spiewak v. Board of Educ. of Rutherford, 447 A.2d 140, 149 (N.J. 1982).
85. Jefferson Classroom Teachers' Ass'n v. Jefferson Elementary School Dist., 187 Cal. Rptr. 542 (Cal. Ct. App. 1982).
86. WIS. STAT. §§ 118.22(4), 118.23(5) (1982).

Nevertheless, "being in conflict with" is not always deduced simply because a collective bargaining agreement is at variance with the statutes. In Pennsylvania, a court ruled that the school code's grant of authority to boards to "make such regulations as they may deem necessary to make sure that employees on leave shall utilize such leave properly," was found insufficient to permit it to change unilaterally its past practices regarding sabbatical leaves. The court found that "the power to make regulations pertaining to leave policy is not tantamount to a statutory declaration that the area is removed from bargaining."[87] Also in Pennsylvania, it was found that the provisions of the school code were not dispositive of employee status under the state's employee relations act. The PERB was permitted to consider as "merely one factor" the distinction in the code between permanent and substitute teachers in deciding whether the two groups of teachers could both be members of the same bargaining unit.[88] A collective bargaining agreement in Ohio which placed a ten-day time limit on revoking dues deduction authorizations was found not to be in conflict with a general statutory provision assuring individuals of the right to revoke such authorizations.[89]

Open meetings laws and various other kinds of sunshine legislation frequently conflict with the tradition in collective bargaining that negotiation is best conducted away from public view. In Tennessee, a lower court enjoined bargaining in closed session, citing the state's sunshine law. Eoth the board and the association appealed, each having filed charges against the other for violation of that law, among other things. Though the finding of the appellate court was based largely on jurisdictional rather than substantive rationale, it ruled that the teachers' association was not a "governing body" under the terms of the law, hence was not bound by its disclosure provisions, and that the association had no standing to challenge the district's conduct under the law. Thus, the fundamental issue of whether a board can conduct negotiations and planning for them in private was not reached.[90] Planning for bargaining, rather than bargaining, per se, was the issue in Minnesota where it was found that the superintendent of schools was not a member of the board for purposes of the open meetings law, and that a private meeting of the board to prepare for a scheduled session with a state mediator was a reasonable exception to the law's general

87. School Dist. of City of Erie v. Erie Educ. Ass'n, 447 A.2d 686, 689 (Pa. Commw. Ct. 1982).
88. Millcreek, *supra*, note 39 at 675.
89. Franklin, *supra*, note 17.
90. Chattanooga Bd. of Educ. v. Chattanooga Educ. Ass'n, No. 471 (Tenn. Ct. App. 1982); PEB ¶ 37,639.

mandate that negotiations be held in open meeting, except "where otherwise provided by the director."[91] A board in Maryland broke its tradition of sequestered bargaining by unilaterally deciding to conduct negotiations in open meetings. The education association objected on the ground that the board's action constituted a violation of the duty to bargain in good faith, but both the trial and appellate courts upheld the board's action, noting that although the law "authorizes the board to conduct its negotiations with the association in closed session; it in no way requires closed sessions. Under the statute, adjournment of an open meeting into closed session is at the option of the public body, in this case, the board." Departing from its usual rule of eschewing decisions on subjects not raised or argued in trial court, the court considered the related question of whether collective bargaining sessions constituted "meetings of a public body" as defined in the state's open meeting law. It concluded that the quasi-legislative function of such sessions was sufficient to bring them under the definition of "meetings" in the law, and ruled that "the provisions of the Open Meetings Law are applicable, whether it is the board or its authorized representatives that convene to engage in collective bargaining negotiations."[92] Florida's Sunshine Act was held sufficient to prevent enjoining a newspaper reporter from attending a grievance arbitration hearing. All documents, ruled the court were by statute available to the reporter, hence no irreparable injury could be discerned from allowing public access to the oral testimony regarding it.[94]

Though it would seem well settled, from time to time the question of applying federal labor relations laws to state and local public employees arises. The Supreme Court of North Dakota flatly reminded complaining employees of the Bismarck School District that "the federal labor relations laws do not apply to public employees."[95] The teachers had unsuccessfully sought judicial imposition of certain benefits they had failed to achieve through negotiations. Similarly, in New York, a teacher was found to have no right under the National Labor Relations Act to file exceptions to findings of an administrative proceeding.[96] However, a California court reminded litigants that "precedent developed under the NLRA is applicable in cases arising

91. Minnesota Educ. Ass'n v. Bennett, 321 N.W.2d 395 (Minn. 1982).
92. Carroll Cty. Educ. Ass'n v. Board of Educ. of Carroll Cty., 448 A.2d 345, 348 (Md. 1982).
93. *Id.* at 351.
94. Palm Beach Cty. Classroom Teachers' Ass'n v. School Bd. of Palm Beach Cty., 411 So. 2d 1375 (Fla. Dist. Ct. App. 1982).
95. Webster v. Bismarck Pub. School Dist. No. 1, 321 N.W.2d 98, 99 (N.D. 1982).
96. Ciacalone v. National Labor Rels. Bd., 682 F.2d 427 (3d Cir. 1982).

under the state laws where 'parallel conflicts' between the court and the state agency arise regarding pre-emptive jurisdiction."[97]

3.5c Proposals Within Mandatory Scope of Bargaining

The standard trichotomy of bargaining scope—mandatory, permissive, or illegal—does not definitively establish any given topic's bargainability, because even though a subject may clearly be prohibited, bargaining the impact of board decisions regarding it may be mandatory. Making educational policy, for instance, is clearly well within a board's obligation to manage the schools, hence, not bargainable. Yet, the impact of such policy decisions on the wages, hours, or working conditions of employees is consistently found bargainable. A Florida case illustrates: A court found that class size and staffing levels sufficiently touched standards of service offered to the public, to require that they be "unilaterally established by the district." Bargaining the impact of such decisions, however, was not precluded.[98]

Unfortunately, even though the parameters of bargaining topics may be set by law, and cases cumulated to determine specific applications to it, there is no definitive bases upon which employers and employees can agree upon the bargainability of a topic short of third party rulings, whether of a PERB or a court. This situation exists despite various courts having attempted to establish such standards. A decision of the New Jersey Supreme Court provides an example. It held that the following standards would be applied to determine the negotiability of any disputed item: (1) The item must intimately and directly affect the work and welfare of employees; (2) it must not have been pre-empted by statute or regulation, and (3) it must not significantly interfere with the determination of governmental policy-making.[99] A subsequent court's adoption of these standards emphasized that all three must coalesce for an item to be negotiable. Here, the teachers' attempt to arbitrate a grievance alleging racial discrimination was turned aside because "this topic is covered by other statutes and the parties may not agree on any terms which deviate from the standards specified in the other statutes."[100] The same court had earlier refused to rule in a bargainability case, remanding to the PERC a decision on whether the loss of a preparation period and assignment to

97. Modesto, *supra*, note 77 at 640.
98. Hillsborough Classroom Teachers' Ass'n v. School Bd. of Hillsborough Cty., PEB ¶ 37,643 (Fla. Dist. Ct. App. 1982).
99. Local 195, IFPTE, AFL-CIO v. State, 443 A.2d 187, 192 (N.J. 1982).
100. Teaneck, *supra*, note 74 at 491.

detention and other supervision duty were proper subjects of bargaining.[101] In Iowa, the PERB ordered a district to negotiate rather than unilaterally adopt an early retirement plan. The district sought judicial review and the PERB's ruling was set aside by the supreme court, which concluded that "the act's wording and legislative history indicated an intent to retain broad employer rights and to carve out specific narrowly defined, exceptions for mandatory negotiation."[102] Applying this narrow definition to the PERB's finding that the early retirement benefit was "pay" and "wages" as included in the law, the court found that "supplemental pay means pay for rendering a service; it does not appear to be intended as a payment for not working. In other words, it is pay based upon extra services and directly related to the time, skill, and nature of the additional services. It is not intended to be tied solely to a person's age, as the cash incentive plan is here."[103] The same Iowa court determined in another case that the number of credit hours to be earned by teachers for salary advancement as well as what to do when such requirements are not met are mandatory subjects of bargaining. However, the nature of the credits that would be acceptable and the bases upon which the superintendent would determine them were only permissive. The state's PERB had ruled all the topics permissive.[104] The problem of definitively determining bargainability without a third party ruling is highlighted by noting that these disputes arose in Iowa, which has the following unusually specific listing of bargainable topics in its legislation:

> [T]o negotiate in good faith with respect to wages, hours, vacations, insurance, holidays, leaves of absence, shift differentials, overtime compensation, supplemental pay, seniority, transfer procedures, job classifications, health and safety matters, evaluation procedures, procedures for staff reduction, in-service training, and other matters mutually agreed upon.[105]

The Wisconsin Court of Appeals ruled on the bargainability of a number of topics. The district had refused to bargain on all of them, and requested a PERC ruling on their bargainability. The PERC found that all were permissive except one. The teachers' association then

101. The Bd. of Educ. of the Voc. School in Cty. of Camden v. CAM/VOC Teachers' Ass'n, 443 A.2d 756 (N.J. Super. Ct. App. Div. 1982).
102. Fort Dodge Commun. School Dist. v. Public Employment Rels. Bd., 319 N.W.2d 181, 183 (Iowa 1982).
103. *Id.* at 184.
104. Woodbine Commun. School Dist. of Harrison, Monona & Shelby Ctys. v. Public Employment Rels. Bd., 316 N.W.2d 862 (Iowa 1982).
105. *Id.* at 864.

challenged in court the finding that the following are permissive, rather than manadatory: (1) Student contact periods; (2) a teacher's right to discuss school practices and policies and to challenge such policies and their effects through grievance procedures; (3) data contained in teacher application forms and utilized in oral interview procedures; (4) a teacher's responsibility to maintain classroom discipline; (5) the staff handbook and its relation to the collective bargaining agreement; (6) the school board's obligation to provide teachers with clerical assistance; and (7) a teacher's right to be free from discipline when speaking or writing as a citizen.[106] The court of appeals affirmed regarding the first six, but reversed as to the last. The decision discussed at length the teachers' contention that changes in the state's bargaining law and the practices of public sector labor relations necessitated that the court abandon its old tests for assessing the validity of agency rulings, *i.e.*, (1) "the construction and interpretation of a statute adopted by the administrative agency charged by the legislature with the duty of applying it is entitled to great weight;" and (2) the agency's determination will not be reversed "where its statutory interpretation is one of several reasonable interpretations that can be made equally consistent with the statutory purpose." The court declined this invitation, reaffirming that the applicable standard for determining whether a subject is mandatory or permissive will continue to be

> a proposal primarily related to wages, hours, and conditions of employment is a mandatory subject of bargaining on which there is a duty to bargain. A proposal that related to educational policy and school management and operation is a permissive subject of bargaining and it imposes no bargaining duty.[107]

The decision also discussed at length the court's rationale for its finding in each of the disputed topic areas.

Initital resolution of such disagreements on bargainability by litigation is discouraged in Wisconsin by the statutes, which provide that

> whenever a dispute arises between a municipal employer and a union of its employees concerning their duty to bargain on a subject, the dispute shall be resolved by the commission on petition for declaratory ruling. The decision of the commission shall be issued within 15 days of submission and shall have the effects of an order.[108]

106. Blackhawk Teachers' Fed'n Local 2308 v. Wisconsin Employ. Rels. Comm'n, 326 N.W.2d 247, 250 (Wis. Ct. App. 1982).
107. *Id.* at 252.
108. Wis. Stat. § 111.70(4)(b) (1982).

The California Court of Appeals ruled in a complex decision that the following are mandatory subjects of bargaining under the state's bargaining law: Reduction of preparation time within the school day without changing the length of the work day; regulation of the activities of union stewards; and assignment of bus drivers to special trips. However, bargaining on proposals regarding the following was found not to be permitted: Discrimination based on political, racial, religious, sex, and other grouping; organizational rights of communication with its membership; orientation to and distribution of the published collective bargaining agreement; bonus for suggestions; limitations on hiring students as employees; creation of new positions; reclassification of old positions; layoff and seniority for nonprobationary employees; employee discipline where it is at variance with the statutes; in-service training; and limitations on outside contracting.[109] It should be noted that California's bargaining law, in the words of the court, is "aimed at narrowing the scope of bargaining" and only admits of two classes of bargaining subjects: (1) mandatory and (2) forbidden (the statute states that "all matters not specifically enumerated are reserved to the public school employer and may not be a subject of meeting and negotiating").[110] Mandatory negotiation of a topic extends even to those not yet in an agreement ruled a Kansas court. A board had defended unilaterally changing the number of teaching days by pointing out that the length of the school year was not covered in the agreement.[111]

3.5d Proposals Within Permissive Scope of Bargaining

If bargainability is defined as a three-stage, progressively descending quantum of obligation, then all is not lost, or won, simply because certain subjects may be found nonmandatory. They may still be permissive, and with both sides agreeing to do so, may be bargained. Should agreement on these be reached, the permissive distinction disappears, and it becomes an enforceable part of the extant contract, though probably not extending beyond it. The main function, therefore, of the classification is to permit both sides to elect to bargain or to decline to bargain the subject; or, once begun, to cease bargaining it. In three states, the scope of permissive subjects was sharply limited during 1982. Delaware's bargaining statute was similarly interpreted,

109. San Mateo City School Dist. v. Public Employment Rels. Bd., 179 Cal. Rptr. 647, 653-658 (Cal. Ct. App. 1982).
110. *Id.* at 651.
111. Dodge City Nat'l Educ. Ass'n v. Unified School Dist. No. 443, 635 P.2d 1283 (Kan. Ct. App. 1981).

the court finding that the law's requirement of good faith negotiation on salaries, employee benefits, and physical working conditions, but referring only to "discussion" of other matters, contains "no express provision for 'permissive' subjects of collective bargaining."[112] Reclassification of groups of positions affecting more than 100 job titles was found to be permissive in Maine, not mandatory as the association had sought.[113] Additional rulings on permissive subjects of bargaining are inherent in the decisions reviewed in other sections of this chapter.

A recent development in Wisconsin, where the permissive concept is broadly interpreted, is perhaps more interesting than various isolated rulings that this or that topic is or is not permissive. The state's educational employee association, after enjoying several years of rather generous application of the permissive concept by boards, has recently been lobbying extensively for legislation that would transform all agreements on permissive subjects in any agreement into mandatory subjects in subsequent discussions. The proposal was vetoed by the Governor in 1982, but remains a high priority for the teachers' state organization. Currently employers are being advised by their counsel to eliminate any and all permissive subjects from this year's negotiations (which they can do by simply refusing to negotiate regarding them). This will result in the provisions simply dropping out of existence when current contracts expire. The Milwaukee Public Schools sought declaratory ruling from the PERC on over eighty items in its contract, and received notice recently that only four of them are mandatory. The remainder (more than seventy), it can either bargain or not, as it sees fit.[114] Some districts in the state are trying to avoid direct confrontation with associations on permissive items by seeking agreement on "zipper" clauses to the effect that should the legislation be passed, all "permissive" items currently in the contract will automatically and immediately drop out.

3.5e Proposals Within Prohibited Scope of Bargaining

As was the case in the two preceeding sections, applying the concept is not nearly as neat and definitive as articulating it. Perhaps everyone concedes that certain topics are—perhaps even should be—prohibited in public sector bargaining, but dispute arises in their identification. Courts generally consider topics to be forbidden if they (1) compromise the board's legislative responsibility to operate the schools; or

112. Colonial School Bd. v. Colonial Affiliate, NCCEA/DSEA/NEA, 449 A.2d 243, 247 (Del. Super. Ct. 1982).
113. State of Maine v. Maine State Employees' Ass'n, PEB ¶ 37,542 (Me. Sup. Jud. Ct. 1982).
114. Wisconsin Employment Relations Commission Dec. No. 20093-A (Feb. 1983).

(2) change a practice already set by legislation or policy. The bargainability of any issue within these two parameters can be established by PERB declaratory rulings where so provided or by one side refusing to discuss a proposal, thus inviting a charge of an unfair labor practice; or by arbitration or litigation of a contract dispute, wherein the provision is found to be outside the scope of bargaining, therefore unenforceable. In Maine, the board refused to bargain the subjective aspects of teacher evaluation, claiming prior coverage by preemptive legislation. The court determined that consultation with teachers in developing "policies and procedures" would not be prohibited, but that decisions to reduce staff and the criteria to be used therein, must be retained as the sole discretion of the board. Specifically, the following were found to be not negotiable: (1) The establishment of a joint committee of teachers and administrators to develop evaluation criteria and evidentiary standards of their satisfactory attainment; (2) submission of decisions to terminate a teacher to the grievance process; (3) informing teachers of all classroom evaluation visits in advance; (4) the qualifications of evaluators; and (5) the format of written evaluations. The court was firm in its conviction that

> while the policy established for evaluating tenured teachers intimately and directly affects the work and welfare of these public employees, it also involves the exercise of inherent management prerogatives. A negotiated agreement on that subject would significantly interfere with the determination of governmental policy. Therefore, regardless of the presence of pre-emptive legislation, there can be no negotiation on the subject of criteria for evaluating the teaching staff.[115]

An example of prohibited bargainability being found in litigation of an arbitrator's award occurred in New York. There, a court ruled that a district could not bargain away its responsibility to assign staff, thus upsetting an arbitrator's award.[116]

Perhaps the best guidance on what may be found to be prohibited subject of bargaining can be found in the various cases which were discussed in sections 3.5c and 3.5d. The generally accepted principle is that any topic that is not included within mandated or permissive bounds or is covered by other legislation (such as tenure, certification, or management rights) is thereby preempted for bargaining purposes. This gives some notion of subjects that may and should be avoided.

115. Bethlehem Twp. Bd. of Educ. v. Bethlehem Twp. Educ. Ass'n, 449 A.2d 1254, 1259 (N.J. 1982).
116. Teaneck, *supra*, note 74.

3.5f Terms of Collective Bargaining Agreements

Although most disputes regarding various terms of agreements are discussed in one or the other of the previous sections, some litigation examines directly the content of the agreement's language. The courts have a clear disposition toward resolving such disputes in a manner that will result in a minimum of judicial intrusion into labor relations. An Indiana court explained it thusly: "The courts prefer a construction that harmonizes contract terms over an interpretation that leaves provisions in conflict."[117] A Michigan court found that the terms of an agrement did not prevent a district from deducting from the benefits due a deceased employee's widow, his accumulated and unused sick and emergency leave. A trial court had ruled for the claimant finding that the retirement provisions of the contract applied because "death was the ultimate retirement." The appellate court reversed, finding neither precedent nor contract language for this interpretation.[118] Also in Michigan it was ruled that the terms of an agreement could include a plan to protect minority teachers from disproportionately carrying the burden of layoff done by seniority alone even though no judicial finding of past discrimination had ever been filed.[119]

Wisconsin's rather expansive tradition regarding permissive subjects of bargaining was found to permit a board to agree to terms which limited its statutory power to nonrenew teachers without cause (the statutes do not require just for nonrenewal in most Wisconsin districts). The court ruled that even though the board had limited itself by agreeing to nonrenew only when just cause existed, it still held the exclusive right to decide whether or not to initiate such an action.[120]

Perhaps the most complex case regarding terms of an agreement occurred in Massachusetts where the state's supreme judicial court ruled simultaneously on three companion cases and numerous related intervenors and amicus curiae. The problem arose when the city council, which had the statutory obligation to provide some of the funds for the operation of the schools, and which operated on a single fiscal year budget cycle, refused to appropriate sufficient money to permit implementation of the second and third years of a three-year agreement the school committee had negotiated with the Boston Teachers' Union. Not only were the salary provisions involved, but also job security

117. Elkhart Commun. Schools v. Review Bd. of Indiana Employment Security Div., 438 N.E.2d 323, 325 (Ind. Ct. App. 1982).
118. Carpenter v. School Dist. of City of Flint, 321 N.W.2d 772, 775 (Mich. Ct. App. 1982).
119. Wygant v. Jackson Bd. of Educ., 546 F. Supp. 1195 (E.D. Mich. 1982).
120. Fortney v. School Dist. of West Salem, 321 N.W.2d 225 (Wis. 1982).

clauses were threatened because of the impact of the district's having much less revenue than anticipated. The union sought relief to prevent the layoff of over 2,000 tenured teachers without individual hearings, while both the school committee and the union sought relief to compel the city council to provide sufficient funds to implement the agreement's financial package. The court conluded

> that the salary increases provided for in the collective bargaining agreement are enforceable, and that the mayor and the city council should appropriate money to pay them. We also conclude, however, that the job security clause is unenforceable for periods exceeding one year, and further, that hearings pursuant to G.L. c. 71, sec. 42, are not required where dismissals are due to budgetary considerations.[121]

In enforcing the salary increase, the court depended heavily on a statutory permission granted to public employers to agree to contracts up to three years in duration. It concluded that this provision had bound the city council to all three years of such an agreement when it approved and funded the first year of it in 1980. "Presumably the city council knew that there were incremental cost items that would require funding in the second and third years of the agreement. We think that when the city council approved the contract, it in essence agreed to fund those incremental cost items."[122]

The court, however, had no such statutory provision on which to base its ruling regarding the job security clause. It depended, therefore, primarily on common law principles of inherent managerial rights in finding that

> a provision in a collective bargaining agreement that attempts to restrict the ability of a school committee to determine on an annual basis the size of its teaching staff intrudes into an area of exclusive managerial prerogative. General Laws c. 71, sec. 37, provides that the school committee "shall have general charge of all the public schools...." Essential to the management of the public schools is the ability to determine the appropriate size of the teaching staff in light of available funds. We do not believe that the Legislature, in C.L. c. 150E meant to permit school committees to bargain away their managerial powers in this area.[123]

121. Boston Teachers' Union Local 66 v. School Comm. of Boston, 434 N.E.2d 1258, 1261 (Mass. 1982).
122. *Id.* at 1265.
123. *Id.* at 1267.

An interesting distinction was made by the court between funding salary increases and funding job security agreements. It noted that the unique system of financing the Boston Public Schools

> has the effect of placing the financial burden of maintaining job security in the Boston school system primarily on the school committee. Thus only the incremental costs of collective bargaining agreements, i.e., salary increases ... should be appropriated by the city council. We conclude, therefore, that the Boston school committee may not compel an appropriation by the city council for the purpose of enforcing a job security clause in a collective bargaining agreement.[124]

Denying the union's claim for individual hearings on the layoffs was based on both statute and case law as follows:

> Logic dictates that dismissals based on budgetary considerations be treated no differently than dismissals made because of declining enrollments. Both factors are very similar in their nature, and they often coexist, as is the case here.... Both are established in law as constituting "good cause" for the dismissal of a teacher—the former by case law ... and the latter by sec. 42. For these reasons, ... we construe sec. 42 not to require notice and a hearing when a tenured teacher is dismissed solely because of budetary considerations provided, of course, that such reasons are not proffered by the school committee as a sham or subterfuge.[125]

The importance of contract language to board prerogatives, as well as in protecting employees, was illustrated in a New York case which found that in the absence of specific statutory and contract language permitting it, the board could not withhold the salary of a teacher who was absent from his classes to attend hearings regarding his competence and continuation as a tenured teacher. The court ruled that the failure of the statutes or the terms of the agreement specifically to authorize such action foreclosed the boards' capability to do so inasmuch as, "compensation has been held to be a matter of such substantive right on the part of a teacher that it cannot be withheld without explicit statutory authorization."[126] Teachers in the same state were bound by the terms of their agreement regarding the inapplicability of their substitute service to their seniority, despite a statutory provision to the contrary. The court determined that a collective bargaining agreement may waive certain rights affirmed under the

124. *Id.* at 1268.
125. *Id.* at 1269.
126. Faville v. Board of Educ., 455 N.Y.S.2d 81, 82 (N.Y. App. Div. 1982).

statutes.[127] Terms of an agreement in Vermont which stated that evaluations would "aid" in reappointment decisions were not interpreted to require that reappointment decisions be based on them, in whole or in part. The teacher had less than three years of experience, which influenced the court inasmuch as the agreement distinguished between teachers with less than three years and those with more in its reappointment procedures.[128] Terms which required a district to restore teachers returning from sabbatical leave to the same room of the same school from whence they had departed, were not construed to extend to teachers an administrative or any other nonteaching classes of service.[129] An administrator in Colorado who was reassigned to a teaching position attempted to invoke the requirement of the administrators' agreement that transfer would not occur without reasons being presented. The court found that "transfer" referred only to changes among administrative positions, not changes between them and teaching. Once he was reassigned, ruled the court, any protections due from the administrators' collective bargaining agreement no longer applied to him.[130] In Massachusetts, where the terms of the agreement expressedly denied nonmembers access to the grievance procedures, and where it was unclear whether the employer would have represented the affected employees adequately, such terms were held sufficient to justify a stay of arbitration.[131]

Teachers in North Dakota found that the terms of their agreement did not include items that they had placed on the table during bargaining but had been unsuccessful in getting into the completed agreement. The board was found justified in unilaterally deciding to adhere to past practice and maintain its payroll on a twelve-month schedule.[132] In Rhode Island, the terms of an agreement were interpreted as permitting an arbitration panel to order a board to compile and present to the union a list of teachers who would be affected by a potential grievance ruling. The issue was found not to be a matter of arbitrator's exercise of power; merely the interpretation of the terms of the agreement.[133]

A court in Oregon made an interesting comment regarding terms of collective bargaining agreements in response to a teacher association's assertion that implementation of school board policies should be subject to the grievance procedure the ERB had ruled that:

127. Wiener v. Board of Educ. of East Ramapo Cent. School Dist., 455 N.Y.S.2d 828 (N.Y. App. Div. 1982).
128. Swett v. Vermont State Colleges, 448 A.2d 150 (Vt. 1982).
129. Thrash v. Board of Educ., School Dist. No. 189, 435 N.E.2d 866 (Ill. 1982).
130. Marsh v. St. Vrain Valley School Dist., 644 P.2d 41 (Colo. Ct. App. 1982).
131. Greenfield, *supra*, note 18.
132. Giacalone, *supra*, note 95.
133. Providence Teachers' Union v. Providence School Comm., 440 A.2d 124 (R.I. 1982).

> We shudder to contemplate an arbitrator's pronouncement when asked to determine whether the violation of this policy resulted in an "unfair event." We entertained similar misgivings, in our original order, over submitting to the arbitrator the proper interpretation of the District's policy on student discipline, including the policy that discipline will be applied "fairly and consistently".... Indeed this parade of horribles can be extended on and on by opening the District's 150 page School Board Policy Statement almost at random. And this is no accident. Unlike the language of bargained contracts, written school board policy statements often contain a great deal of pious hope and very little of specific directive. We believe that such policy generalizations serve a distinct leadership function proper to a school board; but that function is sometimes incompatible with the function which *contract* language must fulfill, including the scrutiny of an arbitrator.[134]

3.6 GRIEVANCES

Grievances play a dual role in public sector bargaining. They are not simply means to secure third-party determinations regarding disagreements on the interpretation of contract terms. Recently though that role has not been lost, another has developed. Grievances now function, additionally, as virtually necessary steps preliminary to obtaining judicial review of labor relations disputes. Consequently any contemplation of grievance filing or disposition must take into consideration the possibility that the motives of the parties may supersede the facts of the case at hand. It may be that either the filing of a grievance or one's denial may have less to do with the merits of the dispute than with a desire to have the germane statute or contract provision adjucated after arbitration and reviw by a PERB.

3.6a Grievability and Arbitrability

Arbitration typically cannot be reached without going through the initial step of filing a grievance, thus setting the stage for the disagreement on the application of the provisions of the collective bargaining agreement. Further, court decisions regarding the arbitrability of matters are always based on the validity of the claim that they are subject to or controlled by such provisions. Consequently, for all practical purposes, grievability and arbitrability will be treated in this section not as two questions, but one.

134. Eugene Educ. Ass'n v. Eugene School Dist. 4J, 648 P.2d 59, 60 (Or. Ct. App. 1982).

3.6a(1) Presumption of Arbitrability

It is easy to formulate two answers to the question of the grievability and arbitrability of issues. One, from the employer's point of view would be "as little as possible." The other, from the employees' perspective, would be, "as much as possible." Diehard traditionalists on either side might simply assert, "nothing" or "everything" depending on their current status and vested interests. Such extremism, however, is not helpful, for not unlike the issue of bargainability, no definitive answer to the question of grievability and arbitrability can be formulated; only operational, ever-developing guidelines exist somewhere between the bipolar doctrinaire extremes.

Courts generally refrain from taking either side. They are willing to decide issues on a case by case basis, but only after all administrative remedies, including grievance filing and arbitration are exhausted. This position was well-expressed by the Wisconsin Supreme Court as follows (quoting from an earlier decision):

> The law of Wisconsin favors agreements to resolve municipal labor disputes by final and binding arbitration. An arbitrator's award is presumptively valid, and it will be disturbed only where invalidity is shown by clear and convincing evidence ... the parties bargain for the judgment of the arbitrator —correct or incorrect—whether that judgment is one of fact or law.[135]

In Pennsylvania, a court was no less strident in its opposition to bypassing administrative remedies. "We condemn that practice and hold that hereafter issues involving conflicts between a public school collective bargaining agreement and fundamental statutory policies ... must be presented first to an arbitrator for determination, subject to appropriate court review of any award in conflict with such policies."[136]

Arbitrability, it follows, will be given a wide scope of permissibility. Hence, the question is most often examined by the broad "essence" test, which requires only that the matter be reasonable related to contract provisions rather than wholly and specifically contemplated by expressed language. A Washington court defined it as follows: "There is a strong presumption in favor of arbitrability; all questions on which parties disagree are presumed to be within the arbitration provisions unless negated expressedly or by clear implication."[137]

135. Fortney, *supra*, note 120 at 229.
136. Pennsylvania Labor Rels. Bd. v. Bald Eagle Area School Dist., 451 A.2d 671, 674 (Pa. 1982).
137. The Council of Cty. and City Employees, AFSCME v. Spokane Cty., 647 P.2d 1058, 1060 (Wash. 1982).

The commonly used grant of authority to bargain on, among other things, "terms and conditions of employment," constitutes a broad net of arbitrability; only rarely does a claim of nonarbitrability prevail. A New York district attempted to establish the nonarbitrability of its denial of requests for leave by arguing that the vagueness of the agreement's definition of grievance rendered the matter nonjusticable. This did not persuade the court, which found that the clause defining a grievance as a claim "that there has been a violation, misinterpretation, or inequitable application of a provision(s) of this Agreement" was unambiguous and clearly authorized arbitration of the dispute.[138] Also in New York, a claim that the board improperly considered parent complaints in a decision to deny tenure was found arbitrable. The board had not discussed the communications with the teacher, as required by the contract. Hence, found the court, the matter was contractual rather than solely a managerial prerogative to nonrenew a probationary teacher.[139] Withholding and deferral of salary payments were found to be arbitrable since they were mentioned in the collective bargaining agreement in another New York district.[140]

In Kansas, arbitrability of provisions in an agreement was found valid under the state's professional negotiations act rather than the uniform arbitration act (UAA). A district had refused to implement an arbitrator's award claiming that it exceeded his authority and jurisdiction granted by law. The teachers' association tried unsuccessfully to convince the court that the trial court's decision in its favor had been properly based on the UAA. The court disagreed, remanding the dispute back to the trial court.[141] In Illinois, when a district argued inarbitrability of a matter because the contract lacked "mutuality" arising from the fact that the teachers had at one time claimed they were "under duress" to reach agreement, a court disagreed. It found that the teachers' discomfort with a contract is not dispositive of its arbitrability—only its acceptance is germane. Consequently, the district was not permitted to exempt from arbitration disputes over sick leave and the length of the school day that arose when board action brought the number of days under the state's statutory minimum. The court emphasized that, "the class of inarbitrable issues should be limited to

138. Lansingburgh Teachers' Ass'n v. Hardwick, 446 N.Y.S.2d 471 (N.Y. App. Div. 1982).
139. *In re* Board of Educ. of Armonk Cent. School Dist., 454 N.Y.S.2d 85 (N.Y. App. Div. 1982).
140. DeCiutiis v. East Meadow Union Free School Dist. No. 3, 449 N.Y.S.2d 259 (N.Y. App. Div. 1982).
141. National Educ. Ass'n, Topeka v. Unified School Dist. No. 501, 644 P.2d 1006 (Kan. Ct. App. 1982).

those areas specifically reserved to school boards by the School Code."[142]

Clearly, the burden of proof is on anyone claiming that nonarbitrability renders an award void. The basis upon which a court will determine such claims can best be summarized by the principle that any limits placed on negotiability also constrain arbitrability. This occurs because the two conditions are a unity—either being the mirror image of the other. Two decisions in New Jersey illustrate: One court ruled in the positive case that "if the subjects of the grievance are within the scope of collective negotiations they are clearly within the scope of arbitration;"[143] the other court in the negative that "if a subject is non-negotiable, it is also non-arbitrable."[144]

Some disputes, consequently, go through the entire grievance and arbitration process only to be reversed by courts which find that the matter was not bargainable in the first place, either due to lack of statutory authority or by preemption by other statutes. Thus, an arbitrator in New York was found without the power to order a school board to reassign a grievant to a particular position because such authority is a nondelegable grant to the board.[145] Similarly, in Indiana an arbitrator acted beyond his scope of authority when he determined that the disputed transfer of an employee was conducive to the "general welfare" of the district, the standard provided in the contract. Only the school board, ruled the court, has the power to determine the general welfare through exercising its duties in hiring, promotion, and assigning employees; contract provisions to the contrary were found void.[146]

Limitations can be placed on arbitrability by language in the collective bargaining agreement expressedly limiting grievances to alleged violations of the terms of the agreement. Specifically exempting certain provisions can also limit the range of issues an arbitrator can hear. Kansas law was interpreted by a court as permitting an employer to reserve the term "binding" from applications for arbitration, thus limiting the effect of awards.[147]

3.6a(2) Who Determines?

No court has discovered a definitive a priori answer to who is to determine disputes in contract administration which can cover every

142. Board of Educ., Arbor Park School Dist. No. 145, Cook Cty. v. Ballweber, IEA-NEA, 434 N.E.2d 448, 451 (Ill. Ct. App. 1982).
143. Camden, *supra*, note 101 at 761.
144. Teaneck, *supra*, note 74 at 492.
145. Sweet Home, *supra*, note 83.
146. Tippecanoe Educ. Ass'n v. Board of School Trustees of Tippecanoe School, 429 N.E.2d 967 (Ind. Ct. App. 1982).
147. Dodge City, *supra*, note 111.

conceivable issue. Sometimes the school board is found to be the panel of last resort; other times it's an arbitrator. Often a PERB panel or other administrative hearing body is dispositive. And, in many cases, there is a prospect of formal litigation. The court's comment in a New Jersey case cited earlier illustrates:

> Simply because we have determined that the subject of racial discrimination is nonarbitrable, that does not mean Mr. Subiaurre cannot pursue his grievance before another tribunal. Even though we hold that his grievance is not subject to binding arbitration he is nonetheless free to pursue his grievance before PERC . . . as an unfair labor practice. He can also pursue the grievance before the Division on Civil Rights or the Law Division. . . . We further recognize that the Commissioner of Education, Division of Controversies and Disputes, also has jurisdiction to hear the grievance.[148]

Generally, however, courts are consistent in insisting that conflicts between collective bargaining agreements and the statutes are, as expressed by an Illinois court "for the arbitrators, not the courts, to decide . . . such decisions usually require construing the agreement in light of the customs and practices of the industry, a task peculiarly within the competence of the arbitrator."[149] Not just any old arbitrator will do, however, as was discovered in Connecticut where a court ruled that a city director of labor had no authority to bind a school district in a grievance award. The reinstatement of a discharged employee by the director (acting as an arbitrator) and its subsequent upholding by the labor relations board was therefore reversed.[150]

Though every issue is not guaranteed a day in court, courts of last resort are willing to accept jurisdiction where circumstances warrant it. The Wisconsin Supreme Court discussed the matter at some length in a case arising from a district's discharge of a teacher after conducting a hearing and receiving the recommendation of a fact-finder. The teacher grieved the action and was reinstated by an arbitration panel. A trial court vacated the arbitration decision, and an appellate court reversed. The supreme court affirmed the reversal, reducing the issue to a determination of the legality of the arbitration panel's having conducted a de novo factual hearing to establish, for itself, whether just cause existed for the dismissal. The district claimed that the panel should have limited itself to a review of the record to assess the fairness of the proceedings. The supreme court disagreed wholly, stating that

148. Teaneck, *supra*, note 74 at 492.
149. Board of Educ. of Posen-Robbins School Dist. No. 143½ v. Daniels, 439 N.E.2d 27, 31 (Ill. 1982).
150. New Haven Bd. of Educ. v. Connecticut State Bd. of Labor Rels., No. 19-41-06, PEB ¶ 37,544 (Conn. Super. Ct. 1982).

> the dispute is over who determines whether just cause exists.... We conclude that harmonizing the collective bargaining agreement provisions with the board's power to discharge set forth in section 118.22(2), Stats., leaves the board with the exclusive right to discharge an employee but requires that just cause exist for the discharge. If the employee contends there was no just cause for discharge, he may process a grievance through the grievance procedure contained in the agreement. If that grievance goes to arbitration, the arbitrators under the terms of the agreement, may make an independent determination of whether there was just cause for the discharge, relying on whatever procedures they deem necessary to reach that determination.[151]

Two strong dissents, however, were filed, both of which objected to the decision's broad grant of power to arbitrators in the state to conduct de novo hearings and, thus, encroach on the statutory power of boards of education.

A Pennsylvania court upheld an arbitrator's reversal of a superintendent's decision that a teacher's advanced study was not sufficiently beneficial to the district for it to qualify for tuition reimbursement under the terms of the agreement. The arbitrator heard testimony regarding the content of the courses and independently determined them to be beneficial to the district. The court felt the action to have been rationally derived from the terms of the agreement and refused to concede that it had usurped the board's authority in any way.[152] Another court in the same state ruled similarly, finding that under the terms of the agreement disputes on the standards to be used in determining a teacher's entitlement to a salary increase based on graduate credits was arbitrable. The courts, according to the rationale "must initially determine if the terms of the collective bargaining agreement encompass the subject-matter of the dispute; ... the court's inquiry ends once it is determined that the issue properly defined is within the terms of the agreement."[153] In New York, presumption of arbitrability was reinforced by a court ruling that the PERB was empowered to determine that a residency requirement was a qualification for employment rather than a term and condition of employment. As such, it was beyond the scope of negotiation and arbitration.[154]

151. Fortney, *supra*, note 120 at 232-233.
152. Rose Tree Media School Dist. v. Rose Tree Media Educ. Ass'n, 442 A.2d 23 (Pa. Commw. Ct. 1982).
153. West Chester Area School Dist. v. West Chester Educ. Ass'n, 449 A.2d 824, 825 (Pa. Commw. Ct. 1982).
154. Rensselaer City School Dist. Unit of Rensellaer Cty. Educational Local of Civil Service Employees' Ass'n v. Newman, 448 N.Y.S.2d 883 (N.Y. App. Div. 1982).

3.6a(3) Remedy as a Factor in Arbitrability

Courts, on occasion, set aside awards—taking unto themselves the prerogative to restore faulty determinations. They do not do so lightly, however, for they recognize the broad authority that is vested in an administrative body or procedure, whether it arises from statutory provisions, individual contracts, bargained agreements, or the courts' own long-standing desire not to hear labor related cases. In Florida, nevertheless, a teacher won back pay after a court decided that a state agency's admission of error in revoking his certificate carried with it the obligation to make retroactive salary restoration.[155] In Washington, an arbitrator's consideration of a grievance was found valid even though the district had, in the meantime, made a nonappealable decision to nonrenew the teacher's contract. The latter action only functioned, according to both the arbitrator and the court, to prevent the arbitrator from reinstating her to full contract status. Other redress appropriate to the violations was permitted.[156]

3.6a(4) Procedural Issues

Correct procedure is at the heart of all dispute resolution in public sector bargaining, whether the issue is initiated by employer or employee. Generally, the fundamental procedural requirement is that all administrative remedies, starting with filing a grievance and going through arbitration and PERB review are required prior to filing a complaint in court.[157] A teacher's recovery in a Vermont trial court of a claim of unjust dismissal was set aside on appeal because the teacher had cited the collective bargaining agreement in his complaint but had never gone through the administrative procedures listed therein.[158] Citing the exact provisions allegedly violated is the foundation of all procedures leading to arbitration, although courts often adopt a generous definition of what constitutes such citation. Listing sections by number and "tracking the language of such sections" in the descriptions of the alleged violation is much to be preferred.[159] One association in New York was required to be specific in citing references regarding claimed violations before arbitration could be invoked.[160] This, despite

155. Brooks v. School Bd. of Brevard Cty., 419 So. 2d 659 (Fla. Dist. Ct. App. 1982).
156. North Beach Educ. Ass'n v. North Beach School Dist. No. 64, 639 P.2d 821 (Wash. Ct. App. 1982).
157. Spokane County, *supra*, note 137; Zell v. Board of Educ. of City School Dist. of New York, 450 N.Y.S.2d 875 (N.Y. App. Div. 1982).
158. Morton v. Essex Town School Dist., 443 A.2d 447 (Vt. 1982).
159. Board of Educ. of Cattaraugus Cent. School v. Cattaraugus Teachers' Ass'n, 447 N.Y.S.2d 51 (N.Y. App. Div. 1932).
160. Dansville Cent. School Dist. v. Dansville Teachers' Ass'n, 448 N.Y.S.2d 303 (N.Y. App. Div. 1982).

another court's finding that an interpretation of a collective bargaining agreement in New York could be arbitrated without an actual citation of a violation. The agreement, according to the court, "specifically permits the union to invoke the grievance procedure when it believes that there has been misinterpretation of any of the provisions of the agreement."[161] In Rhode Island, specificity of citation was not extended to include requiring the board and the teachers' to agree totally on the issue presented in their dispute. Their disagreement was not allowed to thwart the "submission" requirements of the binding arbitration statute.[162]

Procedural necessity was found sufficiently important by a Vermont court that it refused to substitute oral discussion of a grievance for contractually required written filing.[163] Procedures can be broken, as well, by failing to treat them as significant. A teacher who failed to attend her own hearing, failed to notify district of her projected absence, and failed to request continuation of the proceedings, was found to have failed, as well, to establish any intent to pursue her interests in receiving back pay that was allegedly due.[164] An extensive discussion of procedural issues occurred in a California case. An instructor in the Defense Language Institute was unsuccessful in obtaining a United States district court hearing for his damage suit against the United States for breach of contract because his claim exceeded the $10,000 limitation set by law for district court jurisdiction.[165] A teacher in Illinois was foreclosed from appealing to a court an adverse arbitration decision regarding her claim to extra duty pay. She had not appealed first to the PERB.[166] A teacher in Florida was not permitted to reformulate an appeal for reinstatement based on the removal of only two letters from her personnel file. Her reinstatement by an arbitrator had been vacated because he had exceeded his authority in removing six documents from her file. The nonspecificity of her original grievance regarding the six letters in question was found to have constituted a waiver of specific claims based on only two of them.[167] Public employees who were not members of the bargaining unit were, on the other hand, not required to activate arbitration by submitting to

161. *In re* Board of Educ. of Greenburgh Cent. School Dist. No. 7, 445 N.Y.S.2d 468, 469 (N.Y. App. Div. 1981).
162. Providence, *supra*, note 133.
163. D'Aleo v. Vermont State Colleges, 450 A.2d 1127 (Vt. 1982).
164. *In re* Barrington Educ. Ass'n, 437 A.2d 718 (N.H. Super. Ct. 1981).
165. Karahalios v. Defense Language Inst., Foreign Language Center, Presidio of Monterey, 544 F. Supp. 77 (N.D. Cal. 1982).
166. Board of Educ. of Berwyn School Dist. No. 100, Cook Cty. v. Metskas, 436 N.E.2d 587 (Ill. 1982).
167. Watson v. Duvall Cty. School Bd., 408 So. 2d 1053 (Fla. Dist. Ct. App. 1982).

internal union remedies prior to seeking court review. The issue, however, was recovery of dues check-off amounts under a fair-share agreement, which consistently is recognized as presenting a property interest claim.[168]

Probably the most-cited procedural defect is lack of timeliness in filing, inasmuch as grievance procedures typically place limits on the length of time an employee can delay filing a claim that the collective bargaining agreement was violated. Lack of timely filing resulted in the dismissal of a New York teacher's civil action complaint that her seniority status had been violated by the district's not having placed her on the regular substitute list. She had filed the action because her union had declined to pursue her grievance all the way to arbitration. The court dismissed because

> the collective bargaining agreement discloses that the plaintiff was empowered to proceed to the higher stages of the grievance procedure on her own, despite the union's refusal to continue. Plaintiff failed to utilize that relief ... her claim for judicial relief, therefore, must be dismissed on the basis that her sole remedy lay under the collective bargaining agreement.[169]

(All of this added up, in a roundabout manner, to lack of timely filing.) Teachers in Mississippi were found to have foreclosed any claim they might have had to supplement their salaries under district policies by neglecting to apply timely. The district refused to modify their status retroactively. The court upheld, finding that the teachers had once had their opportunity and knowingly let it pass.[170] The same constraint was placed on a board in Maine which had failed to object to the delay in obtaining an arbitrator's ruling during the four years it took him to fashion one. The court ruled that a party "which fails to state its objection to the lateness of an arbitration award in writing prior to the delivery of the award has waived objection."[171] In New York, a collective bargaining agreement's requirement for filing grievances within ninety days of the alleged violation's occurence came into conflict with the statutory provision requiring three months. The court found that the collective bargaining agreement's provision waived and made inapplicable the statutory requirement inasmuch as the parties had affirmatively intended to change the statutory requirement.[172]

168. Franklin, *supra*, note 17.
169. Pizzardi v. Smithtown School Dist. No. 1, 455 N.Y.S.2d 110, 112 (N.Y. App. Div. 1982).
170. Weatherford v. Martin, 418 So. 2d 777 (Miss. 1982).
171. Monmouth School Comm. v. Huston, 437 A.2d 621, 623 (Me. 1981).
172. South Colonie Cent. School Dist. v. South Colonie Teachers' Ass'n, 447 N.Y.S.2d 37 (N.Y. App. Div. 1982).

Timeliness, however, must be clearly required by the collective bargaining agreement or the statutes, as a district in New York discovered. Its request for a stay of arbitration regarding a teacher's complaint about the manner in which he was evaluated during board investigation of charges of incompetence and misconduct because of untimely filing was denied, the court finding that "the agreement lacks any express provision making compliance with the time limitations a condition of precedent; the matter is of procedural arbitrability for the arbitrator.[173] Timeliness will not typically be allowed to thwart the proper disposition of otherwise meritorious claims, particularly when it is broached through no fault of the grievant. In New Jersey, a grievant was allowed thirty additional days to inform the PERC of the tribunal he preferred to hear his claim, which had been found to be nonarbitrable. Without such an extension, the timeliness requirement of all available tribunals would have obviated his ever being heard.[174] In Maine, apparent lack of timeliness was not invoked by a court as constituting sufficient basis to bar a grievance from arbitration. The dispute was over who should file for arbitration (the contract was unclear on the matter) and the meaning intended by the word "immediately" as a timeliness parameter. The court concluded that the district could not avoid arbitration for the failure of the employees to notify immediately of their claim because it was unclear that the duty was exclusively the teachers. Further, concluded the court "the contract's call for immediate notification of the A.A.A. can well be read to be merly hortatory, operating to urge both parties to cooperate in speedy disposition of the existing dispute through arbitration."[175]

Though procedural defects can operate to waive any rights to pursue a matter, teachers in New Hampshire were permitted to file complaints with the PERB two months after the alleged violations. They convinced the court that their signing of contracts agreeing to certain unilateral changes by the district was in response to threats of job loss, hence did not reflect any abandonment of their claims.[176] On the other hand, a teacher who failed to appear for a hearing on charges of misconduct or to have anyone appear on his behalf was deemed to have knowingly and voluntarily waived his right to a due process hearing. Five days notice was considered sufficient since the teacher did not even request a continuance. The fact that he had physically harmed several students (he wounded them with a shotgun) had much to do

173. Cattaraugus, *supra*, note 159 at 53.
174. Teaneck, *supra*, note 74 at 492.
175. Saco Valley Teachers' Ass'n *v.* Board of Dirs., Maine Valley School Admin. Dist. No. 6, 447 A.2d 72, 74 (Me. 1982).
176. *In re* Watson, 448 A.2d 417 (N.H. 1982).

with the court's finding.[177] A federal court in New York ruled similarly, finding that a former teacher who elected not to participate in his association's administrative proceedings in his defense was without standing to carry forward on his own in federal court.[178] A teacher in New York was permitted simultaneous pursuit of remedies both under the statutes and the collective bargaining agreement, even though the potential existed for contrary conclusions between them.[179] However, another in that state was held to resolution of his dispute by the procedures he chose. He was not permitted to seek arbitration after adverse rulings in the administrative forum he selected under state law. He was bound, ruled the court, to review only by the two statutory remedies available—appeal to the state commissioner or the courts.[180] Seeking arbitration was found by a New York court to constitute agreement to consider the award binding. Both parties had agreed to seek the advice on whether certain sick leave benefits were due substitute teachers. When the arbitrator determined that the disputed employees were not covered by the agreement, the board denied the grievance. The court found that the submission and prior agreement to comply with the advice "effectively altered the proceeding from one of an advisory to one of binding arbitration."[181]

3.6a(5) Mangement Prerogatives as a Bar

Virtually all litigation regarding grievance and arbitrability is rooted in a board's exercise of perceived discretionary prerogatives or in the desire to do so. The disputes arise when either the statutes or the terms of an agreement are perceived by teachers as preventing such unilateral action. Since such matters are subject to much grey-area interpretation between the well-recognized governmental duties of boards, on the one hand, and the statutory and contractual obligations they have toward employees, on the other, little prior assurance regarding the scope of such prerogatives is possible. In general, however, it is safe to conclude that assertions of managerial prerogatives foreclosing implementation of terms of collectively bargained agreements will not receive a sympathetic hearing. Inasmuch as such agreements are the result of labor-relations statutes pursuant to legitimate state interest, courts have not conceded to local units of government any constitutional or common law defense against abiding by them. Instead

177. Crane v. Mitchell Cty. Unified School Dist. No. 273, 655 P.2d 205 (Kan. 1982).
178. Giacalone, *supra*, note 96.
179. Cattaraugus, *supra*, note 159.
180. Poole v. Little Valley Cent. School Dist., 452 N.Y.S.2d 829 (N.Y. Sup. Ct. 1982).
181. Plainedge Fed'n of Teachers v. Plainedge Union Free Dist., 448 N.Y.S.2d 226 (N.Y. App. Div. 1982).

courts have adopted a "harmonizing" rolemaking stance, and sometimes make creative efforts to balance the competing claims rather than defer to one side or the other. The treatment of board prerogatives in hiring and firing and contractual protections for individual employees best illustrates this effort. In New Jersey, a court found that

> we need not discuss the preemptive effect of those provisions that address the substantive aspects of teacher evaluation. Such matters, which involve sensitive educational policy decisions, could not be the subject of mandatory negotiations even in the absence of preempting legislation.... However, on those procedural aspects not covered by the rules or addressed only to the extent of establishing a maximum or a minimum time limit, mandatory negotiation is permitted.[182]

Similarly, in Wisconsin, the supreme court has distinguished between a board's nondelegable duty to hire and fire, and the procedures used leading up to those decisions. The state's municipal labor relations statute was found to be sufficient justification for permitting an arbitrator to conduct de novo hearings on the sufficiency of the evidence used by the board in arriving at a decision to discharge a teacher.[183]

Endless opportunities for disagreement occur when deciding whether a particular board's actions falls within the bargainability zone that is bounded on all sides by the distinction between making managerial decisions and discussing their impact. One thing was certain, however, to a Rhode Island court; boards to not have the prerogative to withdraw unilaterally from bargained agreements simply because, at some later date, they feel them to be erosive of their governmental powers.[184] Even an expressed provision in an agreement prohibiting an arbitrator from interfering with the discretionary power of the board was not sufficient to prevent an expansive award from being upheld in Illinois. There the administration of the Cook County Community College was prevented from assigning librarians to advising duty during registration despite contract language allowing the assignment of all faculty to such duty. The arbitrator ruled that the phrase, "professionally related duties" should be interpreted restrictively and applied only to classroom teachers rather than to all educational staff members. In upholding the arbitrator, the court noted that the board had voluntarily relinquished some of its prerogatives in the bargaining agreement and could not expect to regain them by challenging the arbitrator's interpretations.[185]

182. Bethlehem, *supra*, note 115 at 1259.
183. Fortney, *supra*, note 120.
184. Chariho Reg. School Comm. v. Chariho Teachers' Ass'n, 447 A.2d 1140 (R.I. 1982).
185. Board of Trustees of Commun. College Dist. No. 508, Cook Cty. v. Cook Cty. College Teachers' Union Local 1600, 430 N.E.2d 249 (Ill. 1982).

A board's prerogatives can be sharply reduced by its own actions in choosing the manner that issues will be adjudicated. In New York, a board which submitted a matter to an education law hearing panel, "stripped" itself of any additional discretion to submit it, as well, to grievance and arbitration procedures.[186] Prerogatives were limited by a court in Kansas which ruled that if a topic is a mandatory subject of bargaining, the board cannot unilaterally alter its practice therein, even though the matter is not covered in the collective bargaining agreement.[187]

Board prerogatives that seem well-established by statute were not protected in Pennsylvania. Though the school code clearly empowered boards to make necessary regulations regarding leave, a court did not agree that the provision "indicates that the school district retained the right to promulgate regulations at any time during contract term.... The power to make regulations pertaining to leave policy is not tantamount to a statutory declaration that the area is removed from bargaining."[188]

In Indiana, a board unsuccessfully tried to validate its action in delaying the opening of school in order to recover salary overages paid in prior years by claiming board prerogative to establish the manner in which fiscal errors will be corrected. The court found the collective bargaining agreement terms unambiguous in not permitting the board to adjust the work year unilaterally.[189] In Illinois, on the other hand, the statutory power of the school board to shorten the school year, so long as the outcome met minimum statutory requirements, was found to supersede collective bargaining agreements regarding annual salaries based on a thirty-nine week year (longer than the state minimum). The court ruled that salaries were subject to the board's right to lay-off employees due to lack of work or lack of funds.[190]

Board power to assign teachers to extra duty was upheld in Iowa, though the decision is far from a milestone victory for management prerogatives. An arbitrator's decision was overturned, not because of its erroneous outcome, but because of its being based on matters outside the scope of the original grievance. As a matter of fact, the appellate court disagreed with both the arbitrator's ruling that such assignments might be made without violating the master agreement,

186. Poole, *supra*, note 180 at 831.
187. Dodge City, *supra*, note 111.
188. Erie, *supra*, note 87 at 689.
189. Monroe Cty. Commun. School Corp. v. Frohlinger, 431 N.E.2d 93 (Ind. Ct. App. 1982).
190. Board of Educ. of City of Chicago v. Chicago Teachers' Union Local 1, 430 N.E.2d 1111 (Ill. 1982).

and the trial court's finding that the arbitrator's decision "improperly abrogated rights reserved to the employer."[191] In Washington, an arbitrator found contract provisions relating to nonrenewal procedures for nontenured teacher unenforceable, but a court disagreed, concluding

> that a grievance that falls short of direct conflict with the nonrenewal statute may be heard ... we ... decline to limit the remedies available to the arbitrator, but note that his limits are only those of his creativity subject to the bounds of ... [any order] that impinges upon an exclusive power in the school board over employment matters and the negotiated contract[192]

Board prerogatives were also upheld in a Minnesota decision when a court declined to order a district to bargain its decision to reduce its administrative staff due to declining enrollment. The assignment of seven staff members to new positions at reduced pay was ruled to be a legitimate exercise of board powers. A strong dissent, however, was filed.[193] In Washington state, a statute granting boards the prerogative to nonrenew provisional teachers without cause was found not to create a suspect alss. Sufficient state interest was found in the classification to deny the teacher relief.[194]

3.6a(6) Tenure Issues

Litigation regarding proper bases for teacher dismissal and other tenure-related matters is extensively reviewed elsewhere in this *Yearbook*. That disputes regarding tenure arise in the context of bargaining and contract implementation should occasion no surprise, for job security interests loom large in teacher organizations' lexicon of vital interests. Further, tenure, layoff, and recall procedures are often provided in statutes antedating collective bargaining, which often leads to incongruencies between them and contract terms. All of them, whether statutory or contractual, limit in one way or another boards' common law discretion to hire and fire employees, and, other than over the substantive sufficiency of just cause in dismissal cases, most tenure-related litigation arises from one or another of three fundamental questions: (1) Is granting tenure exclusively the board's domain? (2) Can tenure-like property interest be created outside of specific

191. Dubuque Commun. School Dist. v. Dubuque Educ. Ass'n, 315 N.W.2d 847, 851 (Iowa Ct. App. 1981).
192. North Beach, *supra*, note 156 at 824, 825.
193. Minneapolis Ass'n of Admin. and Consultants v. Minneapolis Sp. School Dist. No. 1, 311 N.W.2d 474 (Minn. 1981).
194. Hopp v. Oroville School Dist. No. 410, 639 P.2d 872 (Wash. Ct. App. 1982).

statutory permission to do so? and (3) Can a teacher who engages vigorously in union activity ever be discharged or nonrenewed?

A Massachusetts court answered the first, finding that the labor relations commission (and, presumably, an arbitrator) could reinstate a nonrenewed teacher to his position even though the restoration would result in his attaining tenure under the state's tenure law. The court, agreeing with the commission, found that the school committee's motivation for the nonrenewal was retaliation and retribution for union activity. This decision, however, was not arrived at lightly, for the court considered the burden of proof in such allegations to be on the complaining employee, even though a prima facie showing was found sufficient to shift the burden to the employer. Direct evidence, such as antiunion statements, was not required, the court finding that the plaintiffs had a generally good work record; had engaged in protected activity; and that the activity was plainly visible to employer.[195]

Several courts have answered the second question in the affirmative, finding that enabling legislation for collective bargaining implies the capability to make any agreements that will promote good labor relations (*see*, *supra*, section 3.a(5)). A court in New York ruled on the matter directly, finding that "while it is true that a probationary employee does not ordinarily have a property interest entitling him to a termination hearing under the Fourteenth Amendment ... a collective bargaining agreement may give him a contract right to such a hearing."[196] The grievance procedure was found to invest nontenured teachers with similar tenure-like rights by a court in Pennsylvania.[197]

The third question—can a board remove teachers who are vigorous in union activites?—has been given a qualified "yes." It can be done, but the two actions must not be related. The principle was articulated by the Massachusetts court which provided the answer for question one (quoting an earlier decision):

> [Labor Relations Commission] could find a discharge unlawful under [statute] only if it found that the employee would not have been discharged but for his protected activity. If, however, lawful cause would have led the employer to the same conclusion even in the absence of protected conduct, the discharge must not be disturbed.[198]

195. Southern Worcester Cty. Reg. Voc. School Dist. v. Labor Rels. Comm'n, 436 N.E.2d 380, 384 (Mass. 1982).
196. Gibbons v. Board of Educ. of N.Y.C., 540 F. Supp. 1124, 1127 (E.D.N.Y. 1982).
197. Greater Johnstown Area Voc.-Tech. School v. Greater Johnstown Area Voc.-Tech. Educ. Ass'n, 450 A.2d 787 (Pa. Commw. Ct. 1982).
198. Southern Worcester, *supra*, note 195 at 383.

A Washington court was a bit more expansive, describing three categories into which dismissals associated with labor organization activity must fall: "(1) Cases in which the employer asserts no legitimate ground for the discharge; (2) cases in which the employer's asserted justification for the discharge is a sham and no legitimate business justification for the discharge exists (pretextual firings); and (3) cases in which there is both a legitimate and an impermissable reason for the discharge (dual motive discharges)." The first two types of discharge constitute an unfair labor practice. The third type may or may not constitute an unfair labor practice.[199] Examples occurred in several states. In Maine, an arbitrator's reinstatement of a teacher because her dismissal was "partly motivated" by her union activity was upheld by a court. Restoration included lost wages.[200] Dismissal of an employee in Washington, on the other hand, was upheld even though he claimed antiunion motivation. The court found sufficient evidence of his inefficiency to conclude that he might have been discharged even absent his prounion stance. His claim was remanded to administrative proceedings to determine proper relief, however, which would protect both his and the employer's rights. The court articulated at some length the narrowing that has recently occurred in the traditional "in part" test which is used where a dual motive for the discharge exists. Antiunion bias now must be the "dominant" and/or "substantial motive" for dismissals to be reversed. (The so-called "Mt. Healthy Doctrine" established by the United States Supreme Court in 1977).[201] It is of interest to note that this line of reasoning permits courts to avoid ruling on the claims of bias. When they determine that the dismissal would have occurred at any rate, then the matter of bias—its presence or absence—becomes irrelevant and the courts do not reach the matter.

The Ninth Circuit Court of Appeals, however, did rule on the substance of alleged reprisal for union activity in finding that a teacher's dismissal was not protected by his union activity. He had been dismissed for, among other things, writing a caustic criticism of his supervisor. In his defense, he asserted that the communication was actually a grievance, hence to discipline him for filing it was a prohibited labor practice. The court observed that since most of the complaints cited in the letter referred to conduct cumulated over a long period of time, they fell outside of the collective bargaining agreement grievance procedure which required filing within fifteen days of the alleged occurrence. The court ruled that untimely grievance filing was

199. Washington Pub. Employees' Ass'n v. Community College Dist. No. 9, 642 P.2d 1248, 1252 (Wash. Ct. App. 1982).
200. Lisbon School Comm. v. Lisbon Educational Ass'n, 438 A.2d 239 (Me. 1981).
201. Washington, *supra*, note 199 at 1253.

not a fully protected right of a teacher for which no discipline could be exacted. The dismissal was upheld.[202]

3.6a(7) General

Perhaps the best general statement regarding contract interpretation was that of an Indiana court in a case involving contract terms that provided both for the board's right to transfer employees involuntarily and an obligation to post notice of all vacancies to encourage volunteers to fill available positions. In failing to uphold the district's claim that the former provision gave it the right to dismiss an employee who refused an assignment that had not been posted, the court noted that "contracts are read as a whole and paragraphs or sections are not read alone . . . specific or special provisions prevail over general ones."[203]

The harmonizing role, then leads directly to the courts being very reluctant to examine the merits of an award, either to assess the validity of its interpretation to terms of the agreement or of its application of the law. A Pennsylvania court insisted the following: "The fact that [the] arbitrator . . . may have failed to properly perceive the question or erroneously resolved it, does not provide *justification for judicial interference.*"[204]

3.6b Judicial Review of Awards

The stream of precedent in judicial review of labor relations disputes flowed in two directions during 1982: One was toward the well-established principle that aggrieved persons have a right to their day in court; the other was toward the reality that courts are neither eager to accept jurisdiction of such disputes nor sympathetic to claims that arbitrators' and other third-party administrative proceedings' dispositions are contrary to law. Simply stated, courts do not require administrative disposition of labor relations disputes to meet strict judicial standards. This practice is so pervasive across all jurisdictions—federal and state—that it may be fair to conclude that courts systematically discourage litigation. An Illinois court referred to the "long recognized overriding interest in finality inherent in the submission of a dispute over a bargaining agreement to arbitration."[205] A commonwealth court in Pennsylvania commented that, "submission to

202. Boehm v. Foster, 670 F.2d 111 (9th Cir. 1982).
203. Carpenter, *supra*, note 117 at 325, 326.
204. West Chester, *supra*, note 153 at 825.
205. Posen-Robbins, *supra*, note 149 at 29.

arbitration of public employee grievances arising out of the interpretation of provisions of a collective bargaining agreement is favored."[206] That state's supreme court noted dryly that "in labor disputes resolved by arbitration machinery, the less judicial participation the better."[207] Nevertheless, the cases keep coming, and the courts hear the parties out.

3.6b(1) Standard of Review

The foundation of judicial review is that the courts wholly accept the statutorily established administrative proceedings—from grievance filing to PERB review—as the best way to resolve disputes about collective bargaining agreements. Perhaps the concept most used to make this operational is the stance that if an arbitrator's award draws its "essence" from the terms of the agreement, it will be upheld, despite the fact that, however obvious, alternative or even more correct conclusions would have been equally plausible. Courts throughout the various states utilize similar terms to describe this commitment and the standard expected of the awards: "review of labor arbitrators' decision is highly circumscribed"; or "in any way rationally derived"; or "the product of a reasonable mind."[208] Courts in Pennsylvania, Illinois, Iowa and Wisconsin were blunt about it:[209]

> [Pennsylvania] It is determined that the subject matter of the dispute is encompassed within the terms of the bargaining agreement, the validity of the arbitrator's interpretation is not a matter of concern to the court; [Illinois] whether this court's opinion as to the proper interpretation of the clause may have been different from that of the arbitrator is of no consequence. The parties bargained for the arbitrator's interpretation and this is what they received; [Iowa] it is not the function of the court to determine whether the arbitrator has resolved the grievance correctly; [Wisconsin] we, therefore, must uphold the arbitrator's decision so long as it is within the bounds of the contract language regardless of whether we might have reached a different result under such language, and does not violate the law.

206. Aliquippa Educ. Ass'n v. School Dist. of the Borough of Aliquippa, 437 A.2d 1039, 1041 (Pa. Commw. Ct. 1981).
207. Scranton Fed'n of Teachers Local 1147 v. Scranton School Dist., 444 A.2d 1144, 1147 (Pa. Super. Ct. 1982).
208. Greater Johnstown, *supra*, note 197 at 789; Aliquippa, *supra*, note 206 at 1040; Harborcreek School Dist. v. Harborcreek Educ. Ass'n, 441 A.2d 807, 809 (Pa. Commw. Ct. 1982).
209. Erie, *supra*, note 87 at 690; Fortney, *supra*, note 120 at 233; Cook Cty., *supra*, note 185 at 252; Dubuque, *supra*, note 191 at 852.

The burden of proof required to convince a court to depart from this a priori assumption is clearly reflected in the various ways that courts articulate the basis of their refusal to set awards aside. These often appear in terms such as "this court will uphold an arbitrator's award unless it is[210]

> [Michigan] a clear showing of error....
> [Pennsylvania] arbitrary, capricious, or illegal....
> [Ohio] clearly and convincingly foreign to employees' interests....
> [Wisconsin] a perverse misconstruction of a collective bargaining agreement....
> [Rhode Island] a manifest disregard of contractual provisions or a completely irrational result....
> [New York] arbitrary or capricious or constitutes an abuse of discretion or is affected by an error of law....
> [New Hampshire] gross error of law or abuse of discretion....
> [Oregon] egregious ... repugnant ... grossly erroneous ... palpably wrong....

In Oregon, the supreme court ruled that the same "restrictive test" for review at the agency level (thus tipping the balance toward upholding arbitrators' awards) also applied to review by a court, thus reducing the parameters of judicial jurisdiction.[211] A court in California reminded a district that filing for a PERB ruling in a dispute did not automatically confer exclusive jurisdiction over the dispute on the board. Court jurisdiction, cautioned the court, remained a matter for the courts (and the legislature) to determine.[212] A Kansas court clarified the standard of review in that state by placing all appeals into two categories: (1) Where the employer or the employee refuses to participate in arbitration; and (2) where either refuse to accept or implement an arbitrator's award for cause. In the former, stated the court, there is no judicial jurisdiction, the matter being exclusively reserved for administrative hearings. In the latter, however, court jurisdiction may be invoked.[213] In most disagreements arising out of interpretations of the contract and an arbitrator's disposition of the matter, this would reduce to a requirement to exhaust all administrative remedies prior to litigating.

210. Lansing, *supra*, note 36 at 65; Millcreek, *supra*, note 39 at 674; Ohio, *supra*, note 50 at 1338; Fortney, *supra*, note 120 at 229; Providence, *supra*, note 133 at 128; Rensselaer, *supra*, note 154 at 884; Watson, *supra*, note 176 at 419; Eugene Educ. Ass'n v. Eugene School Dist. 4J, 648 P.2d 60, 66 (Or. Ct. App. 1982).
211. *Id.*, at 67.
212. Modesto, *supra*, note 77 at 640.
213. Topeka, *supra*, note 141 at 1008.

Standard of review was directly examined in a Vermont case in which the PERB had used a "substantial evidence" test in assessing a dismissed employee's appeal of the district's action. The court concluded that by using this test, rather than the broader "reasonable evidence" standards used in arbitration awards, it "abandoned neutrality and tilted towards the state; thereby depriving the grievant of due process."[214]

3.6b(2) Propriety of Awards

Propriety of the award is at the heart of all litigation contesting arbitrators' decisions. Despite the awesome burden of proof required to prevail over the legal presumptions underlying arbitration, seeking the upset of awards is not futile. Though upholding the arbitrator's decision, a court in Illinois reminded litigants that "if arbitrator's award does not draw its essence from the collective bargaining agreement, courts have no choice but to refuse enforcement of award."[215] In Massachusetts, a court accepted jurisdiction in a service-fee case cited earlier because the outcome would affect many "nonparties" to the current dispute.[216] In Rhode Island, a court ruled that a judicial de novo hearing was justified because the school committee had selected neither of the two statutorily designed routes for challenging a matter's arbitrability, had not participated in the arbitration that was carried forward by the teachers, yet had influenced the arbitrator via telephone (the teachers had lost the award).[217]

Whether the arbitrator exceeded his authority by failing to base the award on the terms of the agreement is the primary basis upon which awards are stayed or vacated. An Iowa arbitration based a ruling in favor of the teacher grievants in an extra duty assignment case on the procedural issues of how and when the assignments were made rather than whether the board had the authority under the contract to make the assignments in the first place. A trial court vacated the award, and the appellate court agreed, because

> if the matters on which the arbitrator had rested his decision had been within the scope of the issues which were submitted for arbitration, we would doubtless be without power to review the results of the arbitrator's decision ... because we hold that the issue was not submitted, we are without reluctance to express our view that if, as found by the arbitrator, the subject matter [of the board's action] was not precluded by the master agreement, the actions are not otherwise improper.[218]

214. *In re* Grievance of Muzzey, 449 A.2d 970, 973 (Vt. 1982).
215. Cook Cty., *supra*, note 185 at 252.
216. Chariho, *supra*, note 18 at 184.
217. NEA Hopkinton v. School Comm. of Hopkinton, 452 A.2d 1149 (R.I. 1982).

In Oregon, a district departed from its past practice (though not from contractual terms) in hiring persons for part-time coaching positions who were not members of the bargaining unit. The association claimed that the deviation had to be bargained. The board refused, citing management prerogatives. An arbitrator found no contractual violation but awarded the association relief on the basis that the board's refusal to bargain the matter was an unfair labor practice, bringing the matter within his jurisdiction. The employment relations board on review, reversed, finding that "the arbitrator's jurisdiction was limited to the contract by the document itself. We can say, then, with positive assurance, that the arbitrator exceeded his jurisdiction and authority in this case."[219] Both the trial and appellate courts agreed with the ERB despite the long-standing and strong precedent they cited indicating that arbitrators' decisions will be upheld unless the ruling is "so grossly erroneous as to strike at the heart of the decision-making process." They found just such an error in the award, agreeing with the ERB that "the arbitrator's conclusion that there had been no violation of the agreement divested him authority to make any award."[220] Regarding the association's contention that this aspect of the award was in error (a possibility that the ERL had raised, itself) the court replied that

> the simple answer is that the association entered into an agreement under which certain disputes are arbitrable. The association does not contend that the agreement's arbitration provision is inapplicable to the grievance it filed. The arbitration forum was of the association's and the district's choosing. Arbitration has certain advantages and disadvantages that are not common to other forums, but like any other forum, arbitration carries with it the inherent risk that the effective final decision-maker will be wrong. For reasons previously stated, we do not find the fact that the arbitrator may have been wrong here to be a basis for reversing his conclusion of law; and we also find that the fact is not a basis for remanding the matter to him to make a second decision which the association might consider right.[221]

Where the remedy fashioned included the arbitrator's retaining jurisdiction over the matter to oversee its implementation, a California

218. Dubuque, *supra*, note 191 at 853.
219. Eugene, *supra*, note 210 at 63.
220. *Id.* at 64.
221. *Id.* at 68.

court found that though such practice was well-set in both state law and terms of the agreement, it could be misused. In the dispute, a teacher had successfully grieved the district's having assigned someone else to teach a class. Both full restitution and priority for teaching the next such class were granted, with the arbitrator retaining jurisdiction on both matters to ensure an equitable settlement of the salary restitution and to ensure that preference was actually given, as directed. The district claimed in trial court that the retention of jurisdiction exceeded the arbitrator's authority, and the court agreed. An appellate court found that retention to oversee the determination of the back pay was justified, but retaining jurisdiction over giving the employee priority in subsequent assignments, was "unnecessary and improper. The remedy is self-executing. Therefore the retention of jurisdiction was surplusage and should be striken by the trial court."[222] In New York, on the other hand, an appellate court upheld a lower court's vacating of two arbitration awards on the basis that they contravened public policy. In each, the district had been ordered to pay employees for work done by volunteers. A vigorous dissent was filed.[223]

In Illinois, a district claimed that an award was not connected to the contract, was based on the arbitrator's mistaken belief that the agreement contained a past-practice clause, and that the award violated a provision in the contract itself. It also maintained that the arbitrator had interfered with the board's discretionary powers. At issue was the assignment of librarians to registration duties under contract terms which read, "duties of faculty members during registration period shall consist of counseling, programming, and other professionally related duties." The arbitrator found the language to be unclear and ambiguous as to its application to librarians, hence accepted jurisdiction and remedy, ultimately fashioning an award that exempted them from registration duties.[224] The court upheld the award.

Courts, as well, can exceed their authority by ruling on the merits of cases. It was found improper for a court in New York to have assessed the merits of a teacher-board dispute rather than limit itself to ruling on the arbitrability of the matter. The appellate court referred specifically to the fact that the grievance listed specific allegations of violations cross-referenced to specific contract terms. This made the matter one which could and should have been remanded to arbitration

222. San Jose Fed'n of Adult Educ. Teachers v. Superior Court of Santa Clara Cty., 183 Cal. Rptr. 410, 414 (Cal. Ct. App. 1982).
223. Onteora Cent. School Dist. at Boiceville v. Onteora Nonteaching Employees' Ass'n, 452 N.Y.S.2d 22 (N.Y. App. Div. 1982).
224. Cook Cty., *supra* note 185 at 250.

rather than judicial disposition.[225] An Indiana court was found to have exceeded its jurisdiction in vacating an award for an alleged error of law by the arbitrator. The appellate court based its decision on the principle that

> generally an arbitrator's mistake of law or erroneous interpretation of law does not constitute an act in excess of the arbitrator's powers . . .; manifest disregard of the law has been acknowledged to be an exception to the general rule that a mistake of law is not a ground upon which an award may be vacated. . . . Manifest disregard of law occurs when arbitrators understand and correctly state the law but proceed to disregard the same.[226]

A trial court in Washington also exceeded its authority to review an arbitrator's decision. Since no contractual or statutory authority could be found giving it authority to review the dispute, its hearing the case was found improper.[227] In Pennsylvania two arbitration awards which had been reversed by trial courts were reinstated. In one, bifurcated proceedings (arbitration first to determine the existence of a violation; arbitration a second time to establish the propriety of recovery) had been set aside. The appellate court restored the awards even though conceding that dual proceedings are frowned upon. The court was creative in clarifying how the compensation award for days lost would not be automatic once a finding of improper withholding by the district was determined. Rather, it reasoned, the award of a day's pay for the lost time was a "damage" assessment against the district for having been found in violation of the collective bargaining agreement.[228] In the other case, a district's refusal to base a coaching assignment strictly on seniority, per the terms of the contract, had been upheld by the trial court. Both the arbitrator and the appellate court agreed that the contract limited the district to the seniority standard alone, once all candidates were evaluated as being "satisfactory." The court reviewed the standard for judicial review of arbitration awards as follows: "Judicial inquiry into the arbitrability of a grievance is limited to a determination of (1) whether or not the parties entered into an agreement to arbitrate, and (2) whether or not the dispute falls within the arbitration clause."[229] No other considerations, accordingly, were found to be within the purview of a court.

225. Catharaugus, *supra*, note 159.
226. Southwest Parke Educ. Ass'n v. Southwest Parke Commun. School Trustees Corp. Bd. of Trustees, 427 N.E.2d 1140, 1147 (Ind. Ct. App. 1981).
227. Gray's Harbor Cty. v. Williamson, 634 P.2d 296 (Wash. 1981).
228. Scranton, *supra*, note 207 at 1149.
229. Scranton Fed'n of Teachers Local 1147 v. Scranton School Dist., 445 A.2d 260, 262 (Pa. Commw. Ct. 1982).

A Florida court vacated the award of an arbitrator who had ordered the removal of four letters from a dismissed teacher's personnel file then reinstated her because the file contained insufficient justification for her termination. The court found that the arbitrator had exceeded his authority by accepting and utilizing the teacher's request to remove "disputed materials." The court considered this so general that it prevented the board from objecting to the removal of specific items that were germane to its actions.[230]

In Montana, a trial court accepted jurisdiction in a nonrenewal dispute between the district and the state's board of personnel appeals. The supreme court found that the trial court had exceeded its scope of jurisdiction and had erred when it held that the district had

> the sole discretion not to renew the contracts of the two non-tenured teachers; that the nonrenewal of their contracts were not a grievance under the collective bargaining agreement; and that the school district was without authority to bargain with the SEA regarding matters of inherent managerial prerogatives, including hiring and retention of employees.[231]

It then reinstated the personnel board's order, which had held that the contract only provided for arbitrator review of the procedure, not the substance, of evaluation:

> If the teacher was properly evaluated and the basis for the dismissal was discussed with the teacher, then the termination could be for good reason or a bad reason, so long as it was discussed with the teacher. As far as this Board can see, the school district has retained unfettered control over the reasons for dismissal of a non-tenured teacher.[232]

3.7 IMPASSE AND DISPUTE RESOLUTION

3.7(a) Factfinding and Arbitration

Though arbitration has a prognosis of resulting in relatively stable, no matter how unpredictable, outcomes, factfinding enjoys no such promise. A district in Wisconsin voluntarily submitted its projected dismissal of a teacher to a noncontractual factfinding process. Though the teacher voluntarily participated, he specifically reserved all rights under the collective bargaining agreement. After conducting two

230. Watson, *supra*, note 167 at 1056.
231. Savage Pub. Schools v. Savage Educ. Ass'n, 647 P.2d 833, 834 (Mont. 1982).
232. *Id.*

hearings, the factfinder recommended the teacher's dismissal based on verification of nine out of eleven allegations of improper conduct. Both parties then agreed to tripartite arbitration under the terms of the agreement, and the panel selected conducted a full factual hearing, interpreting the contract as permitting such action. By a vote of two to one, the panel did not sustain the charges, and ordered reinstatement. The district then appealed, claiming the arbitration panel had exceeded its authority, and ultimately learned in the supreme court's disposition of the case that an arbitrator can conduct a hearing to determine whether just cause exists if an agreement so provides. Conclusions of the factfinder were given no standing whatsoever to substitute for collective bargaining grievance procedures.[233]

In California, where factfinding is part of the state's employment relations procedures, factfinding was at the center of a controversy that ultimately led to a strike and the filing and counter-filing of unfair labor practice charges by both the district and the union. The issue surrounded the question of whether the district could unilaterally adopt a combination of the terms of the factfinder's report and its own last best offer after declaring that negotiations were over and refusing to engage in post-factfinding mediation. A strike ensued and triggered a complex series of procedural and jurisdictional rulings regarding injunctions sought by all parties both from the PERB and from the courts. A trial court's issuance of a temporary restraining order against the district's refusal to reopen negotiations (as ordered by the PERB), while ruling that it did not have initial jurisdiction to enjoin the strike, was ultimately upheld. Lost along the way was a clear ruling on the status of the factfinder's report. Ordering the district to reopen negotiations suggests strongly, however, that factfinding does not terminate further negotiations. This conclusion must be moderated somewhat by noting that the rationale for ordering reopening of negotiations during the impasse was based solely on the general principle that doing so is required when either employer or employee concessions indicate a "significant shift in its negotiating posture."[234] Definitive disposition was not made of the district's unilateral adoption of certain factfinder recommendations in the same manner as the statute provides for district implementation of its last best offer during impasse. The emphasis throughout the discussion of the appellate court was that under the statutes, the district was empowered only to implement its last best offer; any substantial departure from them, presumably even those fashioned by a factfinder, would not be permitted.

233. Fortney, *supra*, note 120 at 233.
234. Modesto, *supra*, note 77 at 646.

3.7b Rights on Expiration of Contract

Contract theory indicates unequivocally that upon the expiration of a contract, its terms are of no effect. However, applied to date-certain expiration of labor agreements, the principle has of necessity experienced substantial modification. Otherwise, the parties would be required to start with a blank slate at every contract rebargaining, and the continuity of employment rights and obligations, pay schedules, fringe benefits, and other matters critical to the smooth functioning of the organization would be broken. This would be awkward, at best; disastrous at worst. The traditional solution for the problem is to carry the expired contract's terms foward even though they technically no longer exist. From time to time such continuation is written into agreements, even though, according to one court, "it is a well established rule of labor law that an employer may not unilaterally alter the terms and conditions of employment after the expiration of a collective bargaining agreement."[235] In addition, much of the pressure to replace an old agreement with an entirely new one is alleviated by the practice of making new terms retroactive to the expiration of the old agreement.

Problems are not unusual, for there are exceptions to the general rule. For instance the employer may unilaterally change the terms of an expired agreement where (1) bargaining has reached impasse; (2) the union has waived its right to insist on bargaining over the alterations; and (3) the change is required by law.[236] In addition, factors outside the control of either boards or employee organizations sometimes compel changes. Increases in health insurance premiums after the expiration of the agreement and during negotiations in a Delaware district, for instance, resulted in litigation because the district did not "pick up" the added cost. Instead it passed it on to individual subscribers. The union's request for an injunction to compel district payment of the new fee was denied because issuing it would have been "meddlesome" and an "unwarranted interference" in a dispute where the amounts of money were relatively small.[237]

In California, a court reviewed the board's options during impasse as follows: "Once impasse is reached, the employer may take unilateral action to implement the last offer the union has rejected.... The employer need not implement changes *absolutely identical* with its last

235. Lane v. Board of Dirs. of Maine School Admin. Dist. No. 8, 447 A.2d 808, 809 (Me. 1982).
236. *Id.* at 810.
237. New Castle Cty. Voc.-Tech. Educ. Ass'n v. Board of Educ. of New Castle Cty. Voc.-Tech. School Dist., 451 A.2d 1156 (Del. Ch. 1982).

offer on a given issue. However the unilateral adoptions must be reasonably comprehended within the pre-impasse proposals."[238] Inasmuch as the court found the district's unilateral adoptions to have departed substantially from its last best offer, its action was found to have been properly enjoined.

A Maine court refused to consider a board's refusal to grant a nontenured teacher a pretermination hearing as violating an agreement which had expired prior to the beginning of the teacher's current employment. It found that "unilateral alteration of the terms of a collective bargaining agreement after the expiration of that agreement does not result, under the circumstances of this case, in a breach of contract."[239] A job security dispute in New York was remanded to the arbitration process, even though the collective bargaining agreement had expired. The court found that only the effects of the board's decision occured after the expiration; hence "the duty to arbitrate a dispute arising during the term of a collective bargaining agreement survives the contract."[240]

Expiration, however, can have nonbeneficial outcomes to employees. A New York district was not required to comply with an expired contract's provisions regarding salary increments. The court viewed the matter as follows:

> Recognition must be given to the ability or the lack thereof of public employers to meet increased money demands after the expiration of a contract providing for such increases during its tenure. To hold otherwise and make incremental payments, as distinguished from other contract provisions, mandatory during the period between the expiration of one contract and the execution of a successor agreement, even where, as here, the expired contract contained a survivorship clause, does not operate to preserve an existing relationship between the parties, but extends that relationship and gives the association an edge that makes negotiation of annual salary increments that much more difficult.[241]

3.8 CONCERTED ACTIVITY

3.8a Strikes

Due to a combination of reasons, not the least of which must have been the general state of the economy, strikes in general were not big

238. Modesto, *supra*, note 77 at 647.
239. Lane, *supra*, note 235 at 809.
240. Dickinson v. Homer Teachers' Ass'n, 445 N.Y.S.2d 35, 37 (N.Y. App. Div. 1981).
241. Maplewood-Colonie Common School Dist. v. Maplewood Teachers' Ass'n, 445 N.Y.S.2d 267, 269 (N.Y. App. Div. 1981).

news during 1982. In education, things were no different. However, litigation regarding strikes of a few years past made its way into judicial consideration during the year with the result that courts had a number of occasions to explain their attitude toward them. Largely, the outcomes were a reiteration of the fundamental principle that public employees have no common law right to strike. A court in Kentucky so reminded litigants of this "truth" even though a strike was not at issue.[242] In Alaska, however, the matter was the central issue between striking teachers and legislation specifically exempting them from a limited right to strike law. The school district was successful in obtaining a temporary restraining order and a direction for the teachers to return to work. The court ruled that without expressed statutory permission, teachers (or any other public employees) have no right to strike, hence justifying the injunction.[243] A California court came to the same conclusion, finding that though the state's employment relations act "does not prohibit strikes by public education employees, it expressedly withholds authorization for such strikes.... It is apparent that EERA leaves public employees subject to existing case law prohibiting public employee strikes."[244] Strike illegality was found sufficiently evidence in another district in the state to justify the PERB's conditioning an injunction against the baord's refusal to resume bargaining during an impasse on the teachers' returning to work. The strike, itself, was not a major factor in the decision.[245]

Though the presence of a strike would seem self-defining, disputes can arise over whether an employee action constitutes illegal activity. In New York, the simultaneous sick calls of six custodians were found to be sufficiently unusual to meet a "substantial evidence" test that an illegal work stoppage had occurred.[246]

3.8b Enforcement Actions

Though the injunction would seem to be the most swift and certain device to prevent the abrogation of strike prohibitions, their issuance is not often the center of litigation arising from such actions. When used, however, the standard necessary to obtain one varies somewhat. A chancery court in Deleware declined to enjoin a district's passing a health insurance rate increase on to teachers during a negotiations impasse partially because the district's action would not result in

242. Fayette Cty., *supra*, note 32.
243. Anchorage, *supra*, note 24.
244. El Rancho, *supra*, note 42 at 813, 814.
245. Modesto, *supra*, note 77.
246. Smith v. Bloom, 445 N.Y.S.2d 46 (N.Y. App. Div. 1981).

"irreparable harm" to the teachers in light of the small amounts of money involved. The court defined the standard necessary to warrant an injunction as follows:

> Clearly, it is not necessary that a wrong should have actually been committed before a court of equity interferes, since such a requirement should, in most cases, defeat the purpose for which relief is sought.... The threat of an illegal action, such as an illegal strike, must be imminent in order to justify injunctive relief.[247]

According to the Alaska Supreme Court, most jurisdictions impose a similar standard.[248] In California, however, a court expanded it by indicating a willingness to enjoin where an employer's or employees' action "would render any final order of the PERB meaningless."[249]

Though allegations of improperly issued injunctions, either by PERBs or by courts, often are involved as peripheral issues in litigation, their issuance, per se is seldom the central issue by the time a case makes its way into a court of record. By then, the substantive matters typically attract most of the attention. The California case cited immediately above was an exception because its fact background included no less than five injunctions and many subsequent modifications, issued either by a court or by the PERB. The ultimate disposition generally found that a court should avoid injunctions in labor relations disputes. The appellate court greatly approved of the trial court's admission of inexpertise in such matters and its willingness to follow the lead of the PERB:

> This concession by the trial court amply exemplifies the need to defer to the expertise of the PERB so it can perform its mandated duty to effectuate and implement the purposes and policies of the EERA—that is, to promote the improvement of personnel management and employer-employee relations within the public school systems of California.[250]

The court then outlined the standards on which an injunction in such a dispute could be based (quoting an earlier state supreme court decision):

> The court may properly consider any fact relevant to the question whether the requested relief is just and proper, including the nature of the alleged unfair labor practice (*i.e.*, whether it is violent, coercive, etc., and whether it is ongoing or consisted of a single act), its probable effect in relation to the status quo and the statutory objectives, the nature of the relief sought, the

247. New Castle Cty., *supra*, note 237.
248. Anchorage, *supra*, note 24 at 998.
249. Modesto, *supra*, note 77 at 649.
250. *Id.* at 642.

timing of the request, the circumstances of the parties, and the probable effects upon them of the order requested.[251]

Another court in the state ruled similarly, finding that neither a board nor an employees' association can grant jurisdiction to a court or other tribunal simply by asking it to enjoin. Neither can a court or other tribunal acquire jurisdiction by granting such a request.[252]

An injunction was at the center of a dispute in Connecticut, where state law had provided for the issuance of automatic ex parte injunctions against teacher strikes (but not those of other public employees). When the teacher in New Haven went on strike in 1975, an injunction was issued pursuant to the law and resulted in fines and jail sentences being levied against both individual teachers and their Association for failing to "purge" themselves of contempt by returning to work as ordered by the court. They claimed in litigation that applying the automatic ex parte provision solely to teachers was a denial of equal protection of the laws. They also claimed that public remarks made by the presiding judge in the contempt citations effectively disqualified him from being able to hear their cases fairly. The supreme court was able to avoid ruling on the constitutional issue inasmuch as the statute had been amended to delete the provision in question by the time the case was being heard. In examining the charges of judicial disqualification, the court found that public statements made by the judge in a newspaper interview indicated his inability to provide an impartial hearing. The penalties against the teachers were therefore set aside and the matter remanded for rehearing. As far as the large issue of establishing the basis upon which injunctions should be issued, the court upheld the principle that injunctions may be issued and harsh penalties can be levied for violating them, even though the facts of the instant case indicated that "it may be a better practice, as the defendants suggest, for the court to impose civil contempt penalties in increasingly harsh stages so as to increase the pressure on the contemnor."[253]

Predisposition of differing standards for issuing an injunction depending upon whether it would benefit the employer or the employees was suggested by an Oregon appellate court which declined to support a trial court's enjoining of arbitration on whether the district had properly utilized the evaluation procedures covered in the collective bargaining agreement. It had successfully argued in trial court that requiring it to arbitrate the matter would erode fundamental rights

251. *Id.* at 648.
252. El Rancho, *supra*, note 42 at 812.
253. Papa v. New Haven Fed'n of Teachers, 444 A.2d 196, 203 (Conn. 1982).

belonging exclusively to the board. In reversing, however, the appellate court said "we conclude that the District has failed to show any irreparable injury that would justify judicial intrusion in this case."[254]

Injunctions are not the only response that is made to illegal work stoppage or other concerted action. Less drastic measures are more often taken, the most common being to withhold wages and/or fringe benefits for days not worked, a penalty that is virtually self-executing. In Pennsylvania, a dispute arose over a PERB settlement of a strike which called for 183 days of paid work after a strike in the mid-1970s. A state statute, however, prohibited paying any public employee for the period of any strike, and the district disputed the order. Though the merits were not resolved by the court, it ruled definitively that the dispute over the day of pay that was being contested was a proper subject of arbitration, and ordered the district to submit it to the grievance procedure.[255] On the other hand, a court in California ruled that the PERB is not the appropriate forum to determine alleged damages due a district from a teacher strike. Such determinations, ruled the court, are properly in the jurisdiction of the judicial system.[256] In a New York federal court, a teacher attempted to have two days' wages that were withheld as a fine for participating in an illegal strike restroed. He had used the state's consumer credit act's proscription against garnishment as a cause for action, but the court denied the claim, affirming prior rulings that such fines are legitimate.[257] This decision is in concert with others in that state upholding the constitutionality of monetarily penalizing teachers who engage in illegal strikes.[258]

In an issue related to monetary penalties for striking, a New York court has ruled that withholding taxes due on wages deducted as a penalty for participating in a strike were not required to be collected within ninety days of the payment of the wages, as required by the statutes. It is of interest that the court approved requiring taxes to be paid on the withheld wages, however. Thus, they had to be paid over and above the reduced wages already received. The court considered the wages as having actually been paid, then returned as fines.[259]

Although damages in torts would seem foreclosed by the tradition in National Labor Relations actions, one court in California has left the

254. School Dist. No. 1 of Multnomah Cty. v. Portland Teachers' Ass'n, 646 P.2d 657, 658 (Or. Ct. App. 1982).
255. Pennsylvania, *supra*, note 136.
256. Fresno Unified School Dist. v. National Educ. Ass'n, 177 Cal. Rptr. 888, 897 (Cal. Ct. App. 1981).
257. Kornit v. Board of Educ. of Plainview Old-Bethpage, 677 F.2d 13 (2d Cir. 1982).
258. O'Connor, *supra*, note 20; Buffalo, *supra*, note 21; Wolkenstein, *supra*, note 22.
259. Tepper v. Wyandanch Union School Dist., 451 N.Y.S.2d 435 (N.Y. App. Div. 1982).

matter in some doubt. A district, in response to a strike, filed claims against the union for over two million dollars in actual and ten million in punitive damages. The trial court dismissed the action for want of jurisdiction. Upon appeal, however, the dismissal was reversed, the appellate court finding ample precedent in the state for judicial jurisdiction under the state's employment relations act. Thus, the question of the damages, if any, is still to be determined.[260] In another California district, the board filed a suit both in torts and in contract violation in response to a teacher strike. The trial court dismissed both claims, but the appellate court reversed on the second cause, the contract violation. It did not equivocate on the tort claim, however, revealing its prognosis for the success of such claims by quoting with approval an earlier court decision in an NLRB case: "[T]he tort action goes to the essence of labor law—the right to strike. The very fabric of the NLRA would be destroyed if such suits could be maintained."[261]

3.9 MISCELLANEOUS DECISIONS

It would be an insurmountable task to review all the PERB rulings dispensed during 1982. Reading such a summary would seem even more arduous. Inasmuch as charges of unfair labor practices and rulings on them by arbitrators more often than not presage litigation, examples of virtually every known classification of prohibited practice can be deduced from the issues in dispute in the various cases reviewed. A small number of "miscellaneous" decisions came down during the year, however, which do not fit well into the chapter's topic headings. They are no less interesting because of their uniqueness.

After bids on new construction came in surprisingly high, a school board in New Jersey undertook to complete a major portion of a new auditorium and library construction itself, using district employees and temporary labor as needed. Funding came from the proceeds of a bond issue that had been arranged pursuant to state law. A temporary employee who had been hired as a mason, then discharged upon completion of his work, challenged the district's wage scale, which was less than that paid by private contractors for comparable work. He cited the state's prevailing wage act, which required comparable wages among contractors, as his cause for action. The court found the act inapplicable to public employers by its own terms, and evaluated the claim that the district was encompased under its terms by having "contracted with itself" as, "patently without merit."[262]

260. El Rancho, *supra*, note 42.
261. Fresno, *supra*, note 256 at 893.
262. Thomas v. Teaneck Bd. of Educ., 446 A.2d 547, 549 (N.J. Super. Ct. 1982).

In Wisconsin, an attorney became enmeshed in a tangled web of competing loyalties and ended up being found disqualified to serve as a hearing examiner in a case. Over the ten years that the case dragged on, he had at one time or another acted in the following capacities: (1) As the employer's counsel in general labor-related matters during the time the original grievance had been filed; (2) as a staff attorney in the state's attorney general's office representing the WERC in a state supreme court hearing on whether the Commission had initial jurisdiction in the grievance; (3) as a member of the WERC panel that reversed the arbitrator's award in favor of the grievant; (4) as a candidate negotiating to return to the attorney general's office during the time the award was being reviewed; and (5) as representative of the employer in labor relations matters upon his return to the attorney general's office. Though there was neither contention nor evidence that he "stood to profit in any way from his decision in the case," the plaintiff contended that, taken together, these were sufficiently irregular to cast doubt on his capability to have heard the employer's appeal of the arbitrator's award impartially. The court agreed, amplifying the appropriate standard as follows:

> This court holds that where a compelling appearance of impropriety on the part of an administrative judge is present, that administrative judge should be disqualified. A compelling appearance of impropriety may be proved by a single egregious act which creates severe suspicion of the administrative procedure. It may also exist where a number of acts, not individually as egregious in nature, together have a cumulative impact of eroding public trust in an administrative agency. We do not hold that every showing of the appearance of impropriety should disqualify an administrative judge. The particular facts of each individual case will determine whether the appearance of impropriety is so compelling that it must result in the disqualification of the administrative judge.[263]

This chapter began with the contention that the opportunities for dispute (and litigation) in labor relations seem endless. As if courts' being asked to determine whether death is the "ultimate retirement," whether one teacher can constitute a bargaining unit, or whether the recognized unit can have the superintendent as its president are not sufficiently representative of endlessness, one last case will be offered to prove the point.

263. Guthrie v. Wisconsin Employment Rels. Comm'n, 320 N.W.2d 213, 218 (Wis. Ct. App. 1982).

A teacher in Florida found herself in the middle of a power struggle between the superintendent and the board. The latter directed her to report to teach in one school and the former directed her to teach in another. During a four month period while she reported dutifully to the school indicated by the board, the superintendent refused to sign her salary warrants, thwarting the negotiation of her pay checks. Seeing no end to the matter, she sued to recover lost wages under appropriate state statutes. She prevailed, but her request for the $6,000 in attorney's fees it required for her to recover the $4,000 in wages she sought was initially turned aside. Although she was unsuccessful in obtaining judgment against the superintendent for "milicious interference with a contractual relationship," she was awarded the legal fees by an appellate court which found that "in enacting Section 448.08 the Legislature intended to avoid the inequity which would result if an employee were required to pay her own attorney's fees in actions for unpaid wages."[264]

264. Doyal v. School Bd. of Liberty Cty., 415 So. 2d 791, 793 (Fla. Ct. App. 1982).